

# **TRANSCRIPT OF RECORD**

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## **Supreme Court of the United States**

**OCTOBER TERM, 1939**

**No. 15**

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**L. BOTELER, TRUSTEE OF THE ESTATE OF RICH-  
MAID CREAMERIES, INC., DEBTOR, PETITIONER,**

**vs.**

**RAY INGELS, DIRECTOR OF MOTOR VEHICLES  
OF THE STATE OF CALIFORNIA, ET AL.**

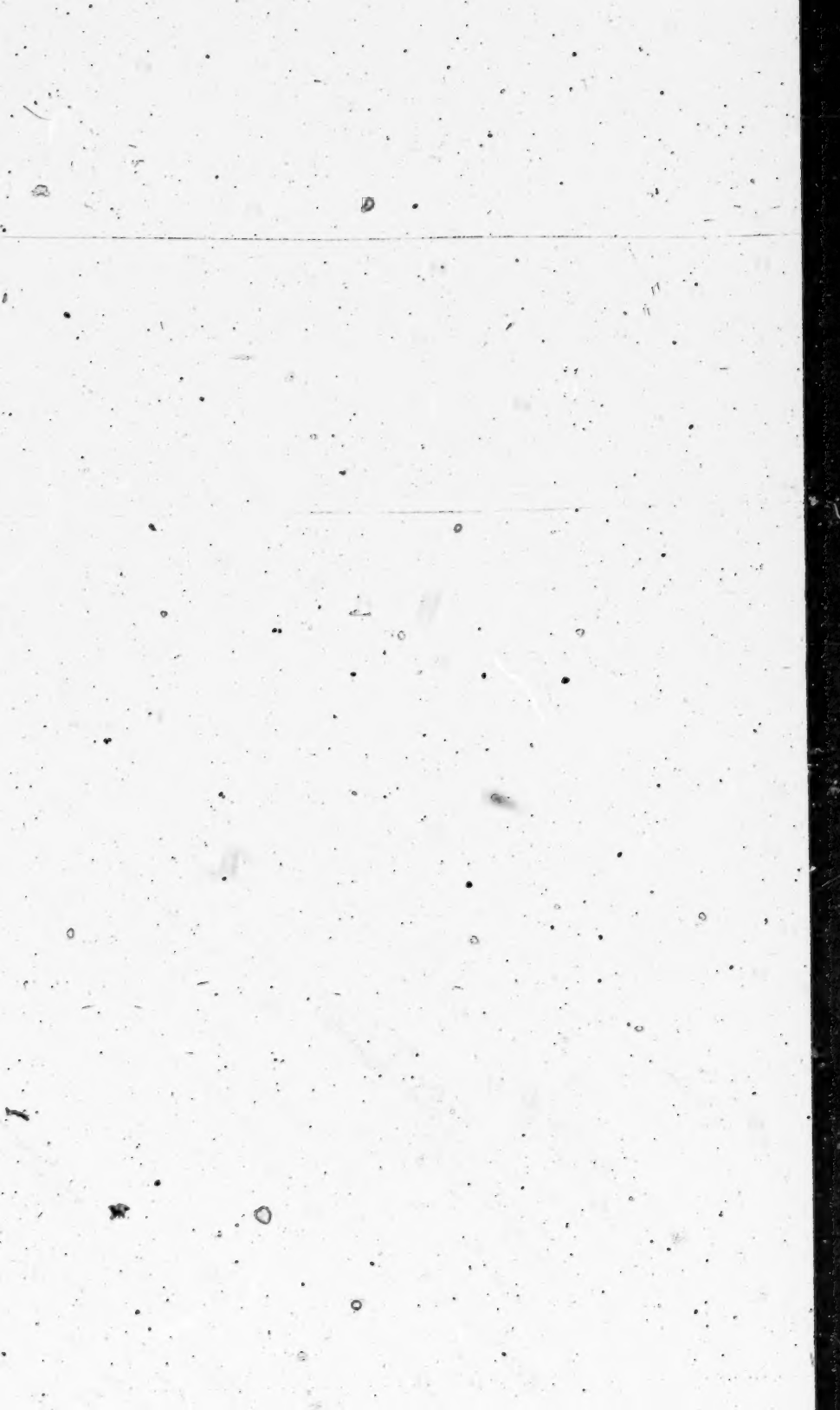
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**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE NINTH CIRCUIT**

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**PETITION FOR CERTIORARI FILED MARCH 14, 1939.**

**CERTIORARI GRANTED APRIL 24, 1939.**





# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 15

L. BOTELE, TRUSTEE OF THE ESTATE OF RICH-  
MAID CREAMERIES, INC., DEBTOR, PETITIONER,

vs.

RAY INGELS, DIRECTOR OF MOTOR VEHICLES  
OF THE STATE OF CALIFORNIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
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[fols. 1-2] Names and addresses of attorneys omitted in printing.

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[fol. 6]

**IN UNITED STATES DISTRICT COURT, SOUTHERN  
DISTRICT OF CALIFORNIA, CENTRAL DIVISION**

No. 28563-C

In the Matter of RICHMAID CREAMERIES, INC., a Corporation,  
Debtor

PETITION FOR ORDER SETTING ASIDE PENALTIES AGAINST  
BANKRUPT—Filed March 6, 1937

To the Honorable Ernest R. Utley, Referee in Bankruptcy:

The Petition of L. Boteler, respectfully shows:

**I**

That your Petitioner is the duly qualified and acting Trustee in Bankruptcy of the above entitled bankrupt and that as such Trustee has now and was in possession of all of the assets of said bankrupt and particularly the personal property hereinafter described.

**II**

That at all times mentioned herein, Ray Ingels was and still is the Director of the Department of Motor Vehicles of the State of California and Howard E. Deems was and still is the Registrar of Vehicles for the State of California.

**III**

That heretofore your petitioner has tendered and offered to pay to the Department of Motor Vehicles of and for the State of California, the proper vehicle license and registration fees for the year 1937 upon all of the motor vehicles hereinafter described and that the said Ray Ingels as such Director and the said Howard E. Deems as such Registrar of Motor Vehicles, and each of them, have re-

fused and still refuse to issue the 1937 license upon said motor vehicles to your petitioner as such Trustee in Bankruptcy unless your petitioner pays in addition to the usual and proper fees heretofore mentioned and tendered, the penalties assessed against such motor vehicles and hereinafter enumerated, namely, the following:

Description of Vehicle	Engine Number	1936 License	Penalty
Ford V-8	18-800655	2X7140	\$6.35
Ford-4	AA12550	K-6764	11.55
Ford V-8	1245685	K-6773	14.25
Ford V-8	18-725243	K-6770	13.25
Ford-4	AA4078994	K-6771	12.00
Ford-4	AA1958177	K-6772	11.70
Ford-4	AAB5057502	K-6767	12.25
Ford-4	AA3303515	K-6769	11.65
Ford V-8	1697695	K-7838	46.25
Ford-4	LB10378	K-6768	11.65
Ford-4	A287871	2Y8393	3.75
Chevrolet-6	T4648696	K-6766	76.85
Ford-4	AA4778199	K-6765	11.80
Homemade	DMV844387	76026	3.20
Ford V-8	18-1984288	1Y9493	6.25
Ford V-8	18-2003574	2Y8394	6.25
Dodge-6	T12-9416	7Y537	6.15
Ford V-8	1655069	2Y8396	6.25
Ford V-8	1294772	PC04133	14.25
Chevrolet-6	K4831949	PCK6388	14.15
[fol. 8]			
Dodge-4	A525823	2Y7141	3.35
Ford-4	AA3827503	K6925	12.25
Ford V-8	18-1294156	6Y6552	6.25
Ford V-8	18-1649707	2Y8395	6.25
International-6	H033321	K2192	14.15
Terraplane-6	65611	2X7142	6.15

#### IV

That the said Ray Ingels as such Director and the said Howard E. Deems as such Registrar of Motor Vehicles have demanded of and from the bankruptcy estate herein all of the aforesaid penalties in addition to the proper 1937 tax herein and that the said penalties herein assessed are not proper claims against said bankrupt estate by reason of Section 57-J of the Bankruptcy Act.

Wherefore, your Petitioner prays that an Order to Show Cause issue out of this Court requiring said Ray Ingels, Director of Motor Vehicles of the State of California, and

the said Howard E. Deems, the Registrar of Motor Vehicles of the State of California, and each of them, to appear before this Court and show cause why the penalties assessed against said motor vehicles should not be set aside, and why the 1937 license plates upon said motor vehicles should not be issued and delivered to your petitioner upon the payment of the proper fees owing thereon exclusive of such penalties, and why such other and further orders should not be made in the premises as to the Court may seem meet and proper.

L. Boteler, Petitioner. David Schwartz, Attorney for Petitioner.

[fol. 9] *Duly sworn to by L. Boteler. Jurat omitted in printing.*

[fol. 10] IN UNITED STATES DISTRICT COURT

ORDER TO SHOW CAUSE—Filed March 6, 1937

Upon reading and filing the verified Petition of L. Boteler, Trustee herein, and good cause appearing therefor,

It is Ordered that Ray Ingels, Director of Motor Vehicles of the State of California and Howard E. Deems, Registrar of Motor Vehicles of the State of California, appear before this Court, at its Courtrooms located at Suite 611 H. W. Hellman Building, 354 South Spring Street, County of Los Angeles, State of California, on the 15th day of March, 1937, at the hour of 10 o'clock A. M. of said day, and then and there to show cause, if any it has, why an order should not be made setting aside the penalties assessed against said motor vehicles described in said petition and why an order should not be made requiring the issuance and delivery of the 1937 license plates upon said motor vehicles, and also to show cause why such other and further order should not be made in the premises as to the Court shall appear meet and proper.

It is Further Ordered that a copy of this Order to Show Cause together with a copy of said Petition be served upon Ray Ingels, Director of Motor Vehicles, and Howard E. Deems, Registrar of Motor Vehicles at least five (5) days before the date set for the hearing hereof.

Done in open Court this 6th day of March, 1937.

Ernest R. Utley, Referee.

[File endorsement omitted.]



[fol. 11] IN UNITED STATES DISTRICT COURT

AMENDED PETITION FOR ORDER SETTING ASIDE PENALTIES  
AGAINST BANKRUPT—Filed April 8, 1937

To the Honorable Ernest R. Utley, Referee in Bankruptcy:

The amended Petition of L. Boteler, respectfully shows:

I

That your Petitioner is the duly qualified and acting Trustee in Bankruptcy of the above entitled bankrupt and that as such Trustee is now and was in possession of all of the assets of said bankrupt and particularly the personal property hereinafter described.

II

That at all times mentioned herein, Ray Ingels was and still is the Director of the Department of Motor Vehicles of the State of California and Howard E. Deems was and still is the Registrar of Motor Vehicles of the State of California.

III

That heretofore your petitioner has tendered and offered to pay to the Department of Motor Vehicles of and for the State of California, the proper vehicle license and registration fees for the year 1937 upon all of the motor vehicles hereinafter described and that the said Ray Ingels as such Director and the said Howard E. Deems as such Registrar of Motor Vehicles, and each of them, have refused and still refuse to issue the 1937 license upon said motor vehicles to [fol. 12] your petitioner as such Trustee in Bankruptcy unless your petitioner pays in addition to the usual and proper fees heretofore mentioned and tendered, the penalties assessed against such motor vehicles and hereinafter enumerated, namely, the following:

Description of Vehicle	Engine Number	1936 License	Penalty
Ford V-8	18-800655	2X7140	\$6.35
Ford-4	AA12550	K-6764	11.55
Ford V-8	1245685	K-6773	14.25
Ford V-8	18-725243	K-6770	13.25
Ford-4	AA4078994	K-6771	12.00
Ford-4	AA1958177	K-6772	11.70
Ford-4	AAB5057502	K-6767	12.25
Ford-4	AA3303515	K-6769	11.65
Ford V-8	1697695	K-7838	46.25
Ford-4	LB10378	K-6768	11.65
Ford-4	A287871	2Y8393	3.75
Chevrolet-6	T4648696	K-6766	76.85
Ford-4	AA4778199	K-6765	11.80
Homemade	DMV844687	76026	3.20
Ford V-8	18-1984288	1Y9493	6.25
Ford V-8	18-2003574	2Y8394	6.25
Dodge-6	T12-9416	7Y537	6.15
Ford V-8	1655069	2Y8396	6.25
Ford V-8	1294772	PC04133	14.25
Chevrolet-6	K4831949	PCK6388	14.15
Dodge-4	A525823	2Y7141	3.35
Ford-4	AA3827503	K6925	12.25
Ford V-8	18-1294156	6Y6552	6.25
Ford V-8	18-1649707	2Y8395	6.25
International-6	H033321	K2192	14.15
Terraplane-6	65611	2X7142	6.15

[fol. 13]

## IV

That the said Ray Ingels as Director and the said Howard E. Deems as such Registrar of Motor Vehicles have demanded of and from the bankruptcy estate herein all of the aforesaid penalties in addition to the proper 1937 tax herein and that the said penalties herein assessed are not proper claims against said bankrupt estate by reason of Section 57-J of the Bankruptcy Act.

## V

That your petitioner has heretofore sold, pursuant to the order of this court, a number of the motor vehicles aforesaid and that he cannot deliver clear title to said motor vehicles for the reasons heretofore alleged; that as to the motor vehicles still unsold, your petitioner herein is unable to sell the same unless the penalties assessed against said motor vehicles are set aside; that the Motor Vehicle Department of the State of California claims a lien upon all of said motor vehicles hereinbefore described and threatens to enforce

said liens and take possession thereof and sell the same to satisfy said liens pursuant to Section 379 of the Vehicle Code of the State of California and as further provided by Chapter 6 of Statutes of 1937.

## VI

That under and by virtue of the provisions of the Bankruptcy Act and other laws pertaining to the collection of a tax and the filing of tax claims, the said Ray Ingels, Director of Motor Vehicles and Howard E. Deems as Registrar of Motor Vehicles and the Motor Vehicle Department are not [fol. 14] barred by the six months period from asserting claims for taxes after said date; that it is practically impossible for the trustee herein to ascertain with certainty the correctness of the tax claims made by the Motor Vehicle Department against said motor vehicles and the bankrupt estate herein; that the trustee herein respectfully petitions for the protection of this court and the bankruptcy estate herein by having a bar order issued herein barring said Ray Ingels, Director of Motor Vehicles, Howard E. Deems, Registrar of Motor Vehicles and the Motor Vehicle Department from asserting any liens upon said motor vehicles after a certain date herein to be fixed by this court and that it is to the interest of all parties concerned in this estate that the Motor Vehicle Department, Ray Ingels, Director of Motor Vehicles, and Howard E. Deems, Registrar of Motor Vehicles be required to forthwith file such claims as they assert against this estate so that said estate may be expeditiously administered and closed promptly at the end of the six month period for filing claims.

Wherefore, your Petitioner prays

1. That an Order to Show Cause issue out of this Court requiring said Ray Ingels, Director of Motor Vehicles of the State of California, and the said Howard E. Deems, the Registrar of Motor Vehicles of the State of California, and each of them, to appear before this Court and show cause why the penalties assessed against said motor vehicles should not be set aside, and why the 1937 license plates upon [fol. 15] said motor vehicles should not be issued and delivered to your petitioner upon the payment of the proper fees owing thereon exclusive of such penalties.

2. That the said Ray Ingels, Director of Motor Vehicles, Howard E. Deems, Registrar of Motor Vehicles, and the



Motor Vehicle Department, and each of them be required to forthwith file such claims as they assert against this estate and the motor vehicles hereinbefore described on or before a certain date to be set by this court, and upon their failure to file such claims that they be forever barred from asserting such claim or claims against this estate or against the motor vehicles hereinbefore described or against the trustee herein either in his official capacity as such trustee or individually.

3. That an order be made authorizing the trustee herein to sell said motor vehicles free and clear of any and all liens claimed by the said Ray Ingels, Director of Motor Vehicles, Howard E. Deems Registrar of Motor Vehicles and the Motor Vehicle Department against all of said motor vehicles upon payment of registration & license fees, without the penalties.

4. For such other and further orders as the Court may seem meet and proper in the premises.

L. Boteler, Petitioner; David Schwartz, Attorney for Petitioner.

[fol. 16] *Duly sworn to by L. Boteler, jurat omitted in printing.*

[File endorsement omitted.]

[fol. 17] IN UNITED STATES DISTRICT COURT

AMENDED ORDER TO SHOW CAUSE—Filed April 8, 1937

Upon reading and filing the amended petition of L. Boteler, Trustee herein, and good cause appearing therefor:

It is Ordered that Ray Ingels, Director of Motor Vehicles of the State of California and Howard E. Deems, Registrar of Motor Vehicles of the State of California, appear before this Court, at its courtrooms located at Suite 611 H. W. Hellman Building, 354 South Spring Street, County of Los Angeles, State of California on the 13th day of April, 1937 at the hour of 2 o'clock P. M. of said day and then and there to show cause, if any it has, why an order should not be made setting aside the penalties assessed against said motor vehicles described in said petition and why an order should

not be made requiring the issuance and delivery of the 1937 license plates upon said motor vehicles.

It is Further Ordered, that said Ray Ingels, Director of Motor Vehicles and said Howard E. Deems, Registrar of Motor Vehicles, then and there show cause, if any it has, why they and each of them should not be required to forthwith file such claims as they assert against the estate herein and the motor vehicles described in said petition and upon their failure to file such claims why they should not be forever barred from asserting such claim or claims against this [fol. 18] estate or against the motor vehicles described in said petition or against the trustee herein either in his official capacity as such trustee or individually.

It is Further Ordered, that said Ray Ingels, Director of Motor Vehicles and said Howard E. Deems, Registrar of Motor Vehicles then and there show cause, if any it has, why an order should not be made authorizing the trustee herein to sell said motor vehicles free and clear of any and all liens claimed by the said Ray Ingels, Director of Motor Vehicles, Howard E. Deems, Registrar of Motor Vehicles and the Motor Vehicle Department against said motor vehicles, and also to show cause why such other and further order should not be made in the premises as to the Court shall appear meet and proper.

It is Further Ordered that a copy of this Amended Order to Show Cause together with a copy of said amended Petition be served upon Ray Ingels, Director of Motor Vehicles, and Howard E. Deems, Registrar of Motor Vehicles at least three (3) days before the date set for the hearing hereof.

Done in open court this 8 day of April, 1937.

Ernest R. Utley, Referee.

[File endorsement omitted.]

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[fol. 19] IN UNITED STATES DISTRICT COURT

#### OPINION OF REFEREE

The questions here to be determined involve the right of the State of California to collect from this bankruptcy estate the penalties provided for in Section 378 of the Vehicle Code of the State of California under the facts and circumstances hereinafter set forth, upon twenty-seven motor vehicles.

On the 16th day of September, 1936, the above named debtor filed its petition under Section 77b of the Bankruptcy Act as amended and on the same day, pursuant to said petition, the Court appointed a temporary trustee with authority to operate the business of the debtor, who was later by order of the Court, made permanent trustee and who as such trustee operated the creamery business of the debtor until the election and qualification of the present trustee, L. Boteler, on January 20, 1937.

The business of the debtor was operated during the above mentioned time at a loss and on December 10, 1936, a petition was filed seeking an order directing the trustee to liquidate the estate of said debtor and on December 22, 1936, such a liquidation was ordered and the case referred to the undersigned Referee for further administration, pursuant to the provisions of Section 77b of the Bankruptcy Act.

On January 20, 1937, following notice duly and regularly given to the creditors of the above named debtor, the present trustee herein, L. Boteler, was appointed as trustee and immediately thereafter duly qualified and took possession of the assets of the debtor including the trucks and automobiles hereinafter referred to.

[fol. 20] As heretofore pointed out, the business had operated under the first trustee at a loss and when the present trustee was duly qualified and took possession of the assets of the debtor, he found himself in possession of certain milk and ice cream routes which he considered valuable assets if the same could be held intact until a sale thereof could be consummated, the trustee realizing at the time that the value of these assets would be ruined if he failed to make the usual deliveries of milk and ice cream until such time as he could consummate a sale. The trustee found himself in possession of sufficient motor vehicles to make said deliveries but with absolutely no funds to purchase the 1937 license plates for said automobiles or to purchase milk and other necessary supplies and labor for the temporary operation of said routes. Rather than sacrifice the value which would be derived from the sale of said milk and ice cream routes, the trustee issued checks against said estate for the payment of milk and other necessary supplies and labor and cashed said checks out of his own personal funds, holding them until he was able to sell sufficient assets of the estate to take care of the checks so issued. The records disclose that the trustee lost no time in advertising and bringing on

for sale and confirmation of sale all the assets of the estate. When the return of sale came on for hearing, to wit: February 25, 1937, the trustee offered all of said assets for sale, as a whole and in parcels including the milk and ice cream routes, but notwithstanding the fact that there were numerous interested bidders in the Court Room who bid for said property, there were no satisfactory bids offered for the same as a whole. The Trustee was then ordered to sell at private sale for a value in excess of the amount bid and at [fol. 21] a value in excess of 75% of the appraised value of said property, making his return of sale in open Court for confirmation and giving interested bidders an opportunity to raise the proposed bid before confirmation of sale. The first property sold in this estate was sold on February 25, 1937, for the sum of \$8260.00 which included the milk and ice cream routes together with milk bottles, milk cases, ice cream cabinets, compressors, etc. There was no attempt to operate the business after the consummation of the sale of these routes. In the operation of these routes, it was necessary for the trustee to use the motor vehicles in question upon the public highways of the State of California from January 20, 1937, to February 28, 1937, the date of the final consummation of said sale. In other words, the trustee operated said motor vehicles upon the public highways of the State of California for a period of twenty four days after February 4, 1937, without having first acquired the necessary licenses, etc.

On or about the 27th day of February, 1937, the trustee went to the Department of Motor Vehicles and the Registrar of Motor Vehicles and tendered the necessary funds and offered to pay the required fees pursuant to provisions of the Motor Vehicle Act not including penalties but said Department of Motor Vehicles refused to issue the necessary licenses and transfers unless the penalties as provided in Section 378 of the Vehicle Code of the State of California were also paid and the trustee refused to pay any of said penalties basing his refusal upon the provisions of Section 57J of the Bankruptcy Act as amended. On March 6, 1937, the trustee filed his petition seeking an order to show cause against Ray Ingels as Director of the Department of Motor [fol. 22] Vehicles of the State of California and Howard E. Deems, Registrar of Motor Vehicles of the State of California and each of them to "show cause why the penalties assessed against said motor vehicles should not be set aside



and why the 1937 license plates upon said motor vehicles should not be issued and delivered to your petitioner upon the payment of the proper fees owing thereon exclusive of such penalties, and why such other and further orders should not be made in the premises as the Court may seem meet and proper", and on April 8, 1937, the trustee filed his amended petition wherein he seeks the following relief—

"Wherefore, your Petitioner prays

1. That an Order to Show Cause issue out of this Court requiring said Ray Ingels, Director of Motor Vehicles of the State of California, and the said Howard E. Deems, the Registrar of Motor Vehicles of the State of California, and each of them, to appear before this Court and show cause why the penalties assessed against said motor vehicles should not be set aside; and why the 1937 license plates upon said motor vehicles should not be issued and delivered to your petitioner upon the payment of the proper fees owing thereon exclusive of such penalties.

2. That the said Ray Ingels, Director of Motor Vehicles, Howard E. Deems, Registrar of Motor Vehicles, and the Motor Vehicle Department, and each of them be required to forthwith file such claims as they assert against this estate and the motor vehicles hereinbefore described on or before a certain date to be set by this court, and upon their failure to file such claims that they be forever barred from asserting such claim or claims against this estate or against the motor [fol. 23] vehicles hereinbefore described or against the trustee herein either in his official capacity as such trustee or individually.

3. That an order be made authorizing the trustee herein to sell said motor vehicles free and clear of any and all liens claimed by the said Ray Ingels, Director of Motor Vehicles, Howard E. Deems, Registrar of Motor Vehicles, and the Motor Vehicle Department against all of said motor vehicles, upon payment of registration and license fees without the penalties.

4. For such other and further orders as the Court may seem meet and proper in the premises."

The Attorney General appeared specially upon the orders to show cause issued pursuant to said petitions, on behalf of said departments, and objected to the jurisdiction of the

Referee to hear and determine the various matters in question. Said objection was overruled however, without prejudice to respondent's right to renew said objection at the conclusion of the testimony. The trustee gave certain testimony and certain documentary testimony was offered including the files and records of said case; thereupon the Attorney General renewed his objection to the jurisdiction of said Referee and the matter was submitted upon briefs.

The first question with which we are concerned is the jurisdiction of a Referee in Bankruptcy to grant injunctive relief under the facts and circumstances here presented. Subdivision 3 of General Order No. 12, provides in part—

“Applications for a discharge, or for the confirmation of a composition where the proceeding is had under section 12 [fol. 24] of the Act, *or for an injunction to stay proceedings of a court or officer of the United States or of a state, shall be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon, to the referee, or in proceedings under section 77 of the Act, to a special master, to ascertain and report the facts* . . . .” (Italics ours.)

Therefore, it is plain that if the trustee is seeking injunctive relief he must first apply to a Judge of the above entitled Court and the Judge will either hear the matter or refer same to a Referee as provided in said general order. Otherwise, the Referee is without jurisdiction to grant injunctive relief against the State of California or any department thereof. Neither has the Referee the jurisdictional power to compel the above mentioned State departments to issue said licenses and transfers.

But the Referee does have power to grant a bar order against said departments of the State of California as prayed for in the second paragraph of the prayer of the amended petition and also has the power to grant the relief prayed for in paragraph 3 of the prayer of said amended petition.

Section 64a of the Bankruptcy Act as amended so provides.

In *Huffel v. Harkelrode, Treasurer*, 18 ABR (NS) 730, at pages 732-733, Justice Brandeis speaking for the Court, said

“Van Huffel admits that the decision of the bankruptcy court was erroneous in denying priority to the taxes, but

insists that it is *Res Judicata*. The treasurer contends that [fol. 25] the judgment of the bankruptcy court authorizing and confirming the sale free from the tax lien is a nullity, because the court was without power to sell property of the bankrupt free from the existing lien for taxes; and also because it did not acquire jurisdiction over the state in that proceeding. First. The present Bankruptcy Act (July 1, 1898, 30 Stat. 544, c. 541), unlike the Act of 1867, contains no provision which in terms confers upon bankruptcy courts the power to sell property of the bankrupt free from encumbrances. We think it clear that the power was granted by implication. Like power had long been exercised by the federal courts sitting in equity when ordering sales by receivers or on foreclosure. *First National Bank v. Shedd*, 121 U. S. 74, 7 S. Ct. 807, 30 L. Ed. 877; *Mellen v. Moline Malleable Iron Works*, 131 U. S. 352, 9 S. Ct. 781, 33 L. Ed. 178.

The lower federal courts have consistently held that the bankruptcy court possesses the power, stating that it must be implied from the general equity powers of the court and the duty imposed by section 2 of the Bankruptcy Act to collect, reduce to money and distribute the estates of bankrupts, and to determine controversies with relation thereto.

No good reason is suggested why liens for state taxes should be deemed to have been excluded from the scope of this general power to sell free from encumbrances. Section 64 of the Bankruptcy Act grants to the Court express authority to determine "the amount or legality" of any tax. To transfer the lien from the property to the proceeds of its sale is the exercise of a lesser power; and legislation conferring it is obviously constitutional. Realization upon the [fol. 26] lien created by the state law must yield to the requirements of bankruptcy administration. Compare *International Shoe Co. v. Pinkus*, 278 U. S. 261, 13 Am. B. R. (N. S.) 108, 49 S. Ct. 108, 73 L. Ed. 318; *Isaacs v. Hobbs Tie & Timber Co.*, 282 U. S. 734, 17 Am. B. R. (N. S.) 273, 51 S. Ct. 270, 75 L. Ed. 645; *Straton v. New*, 283 U. S. 318, 17 Am. B. R. (N. S.) 630, 51 S. Ct. 465, 75 L. Ed. 1060.

In many of the cases in the lower federal courts the order of sale entered was broad enough to authorize a sale free from tax liens as well as from others; and in some of them it appears affirmatively that liens for taxes were treated as discharged by the order. No case has been found in which

the power to sell free from the lien of state taxes was denied."

See also *In re Benson-Beckmann Paint Co., Inc.*, 15 ABR (N.S.) page 343.

*In re General Film Corporation*, 48 ABR, page 149.

*In re Florence Commercial Company*,

*George E. Truman, et al., v. Walter J. Thalheimer*, Trustee,

10 ABR (N.S.) page 284.

The next question involves the right of the State of California to charge a penalty under and pursuant to the provisions of the Motor Vehicle Act. Section 378 of the Vehicle Code of the State of California (1935) provides—

**"When Fees Delinquent. Penalties.**

(a) Whenever any vehicle is operated upon any highway of this State without the registration fee having first been paid as required by this code, such fee is delinquent.

[fol. 27] (b) A penalty shall be added upon any application for annual renewal of registration made on or after February 5 unless the vehicle has not been operated on the highways since the expiration date.

(c) If any other fee is not paid within thirty days after the same becomes delinquent a penalty shall be added thereto.

(d) In every event the penalty shall be equal to the fee and shall be collected therewith.

and Section 379 of said act provides—

**"Seizure and Sale of Vehicle.** (a) Every registration or transfer fee and any penalty added thereto, from the date the same become due, constitute a lien upon the vehicle for which due.

(b) The department shall collect such fee and any penalty by seizure of such vehicle from the person or persons in possession thereof, if any, and by the sale of such vehicle. The seizure and sale herein authorized shall be conducted and carried out by the department in the same manner as is provided by law for the seizure and sale of personal



property by the assessor for the collection of taxes due on personal property."

Therefore, there can be no question of the State's right to charge the proper penalties under the facts here, unless there is some provision in the Bankruptcy Act which will prevent it. The Ninth Circuit Court of Appeals in holding that a receiver in equity may be charged with penalties said in the case of the State of California v. Hiséy, 84 Fed. (2d) 802 at page 805—

[fol. 28] "The trial court disallowed the penalty of 10 per cent, for the nonpayment of the tax when due on the theory that it accrued after the receiver had taken possession of the property. We cannot see that the appointment of a receiver by a court of equity has any effect upon the right of the state of California to collect penalties for unpaid taxes. If the receiver had funds in his possession with which to pay the tax and failed to do so, thus incurring a penalty, no doubt he would be responsible to the estate in his custody for the payment of this penalty incurred because of his neglect, but this liability of the receiver would not relieve the property in his custody from the lien imposed by law. Receivers have been compelled in numerous cases to pay penalties for the nonpayment of taxes which accrued subsequent to their appointment. First Nat. Bank of Houston v. Ewing (C. C. A. 5) 103 F. 168; Bright v. State of Arkansas (C. C. A. 8) 249 F. 950; Spencer v. Babylon R. R. Co. (C. C. A.) 250 F. 24; McFarland v. Hurley (C. C. A. 5) 286 F. 365; Northern Finance Corp. v. Byrnes (C. C. A.) 5 F. (2d) 11. This court has so ruled. Coy v. Title Guarantee & Trust (C. C. A. 9) 220 F. 90 L. R. A. 1915E, 211. If the penalty, as well as the tax, is a lien upon the property in the hands of a receiver, as the statutes of California provide, it is difficult to see how the payment of the penalty can be differentiated from the payment of the lien for the tax. We can see no distinction. The penalty is a part of the tax. State of Kansas v. Bowker, 4 Kan. 114, Kansas P. Ry. Co. v. Amrine, 10 Kan. 318; Village of Westby v. Bekkedal, 172 Wis. 114, 178 N. W. 451; City of Harrisburg v. Guiles, 192 Pa. 191, 44 A. 48; Appeal of City of Titusville, 108 Pa. 600. If the decision of the Circuit Court of Appeals of the Third Circuit in Mc-[fol. 29] Cormick v. Puritan Coal Min. Co., 41 F. (2d)

213, is contrary to this line of authorities, as it seems to be, we cannot follow it."

The rule announced in the case of the State of California v. Hisey holding a receiver responsible where the penalties accrued due to his neglect does not apply here for as must be seen from the facts in this case, the Trustee had no funds with which to pay said fees prior to the sale of the property in question, and was not guilty of neglect. The only provision of law of which I am aware which might change the situation in the case now before us (a bankruptcy case) from the ruling announced by the Court in the case of the State of California v. Hisey, (an equity receivership case) above cited, is Section 57 J of the Bankruptcy Act which reads—

"Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law".

It is admitted by the Attorney General that if the State files a claim in this bankruptcy proceeding, it is precluded by Section 57 J of the Bankruptcy Act from collecting any penalties for in his brief filed herein, he says—

"The State officers herein do not, of course, contend that the penalties in question are an allowable claim against the estate in Bankruptcy. Section 77-j of the Bankruptcy Act specifically provides that such penalties "shall not be allowed". However, this does not mean that the penalties assessed pursuant to law are not a valid obligation [fol. 30] of the tax debtor. It merely means that a claim for the penalties cannot be allowed and paid as such through the bankruptcy estate from the general assets in the said estate. But if said penalties can be collected other than through the bankruptcy estate, there is nothing in the Bankruptcy Act or in any decision to the effect that such penalties do not constitute a valid obligation. And in so far as the penalties may constitute a lien upon property in the bankruptcy estate, such a lien is not affected by the provisions of the Bankruptcy Act. If, then, the Trustee sells the property free and clear of liens, the bankruptcy court

must recognize the lien on the proceeds of sale and direct the satisfaction of said lien therefrom. If the property is not sold free and clear of liens, then, of course, the lien still exists upon the property and the bankruptcy estate is no longer interested therein, and the State is free to pursue any remedies it may have for the enforcement of the obligation as a lien upon the property. The mere fact that an obligation is not an allowable claim under the Bankruptcy Act does not affect the validity of a statutory lien therefor, nor the right of the obligee to the satisfaction of the obligation as a lien upon the property in question." (undoubtedly when the Attorney General refers to Section 77 J, he intended 57 J of the Bankruptcy Act)

Just how these penalties can be paid unless paid from the "general assets in the estate" has not been satisfactorily explained.

[fol. 31] The Attorney General also relies upon the Act of Congress of June 18, 1934, which provides—

"Be it enacted by the Senate, and House of Representatives of the United States of America in Congress assembled, That any receiver, liquidator, referee, trustee, or other officers or agents appointed by any United States court who is authorized by said court to conduct any business, or who does conduct any business, shall, from and after the enactment of this Act, be subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation: Provided, however, That nothing in this Act contained shall be construed to prohibit or prejudice the collection of any such taxes which accrued prior to the approval of this Act, in the event that the United States court having final jurisdiction of the subject matter under existing law should adjudge and decide that the imposition of such taxes was a valid exercise of the taxing power by the State or States, or by the civil subdivisions of the State or States imposing the same."

But it seems that his contentions are answered by the decision of the Court in the case of *In re Messenger's Merchants Lunch Rooms, Inc.* (85 Fed. (2d) 1002) the Court, in speaking of penalties accruing after adjudication in bankruptcy and interpreting the meaning of Section 57

J of the Bankruptcy Act and the Act of Congress of June 18, 1934, said at page 1005—

“(5, 6) Appellants sought to recover penalties of 25 per cent upon the taxes allowed. Section 57j of the Bankruptcy Act (11 U. S. C. A. § 93 (j) provides that debts owing to a state as a penalty shall not be allowed, except for the amount of the pecuniary loss and interest. Following this section, it has been held that penalties are not even provable in bankruptcy, but that claims can be allowed only for the amount of the pecuniary loss. In re York Silk Mfg. Co. (D. C.) 188 F. 735, affirmed *Pennsylvania v. York Silk Mfg. Co.* (C. C. A.) 192 F. 81, appeal dismissed 232 U. S. 718, 34 S. Ct. 601, 58 L. Ed. 813, and certiorari denied; 232 U. S. 724, 34 S. Ct. 602, 58 L. Ed. 815; *People of State of New York v. Jersawit*, 263 U. S. 493, 44 S. Ct. 167, 68 L. Ed. 405; *United States v. Birmingham Trust Co.* (C. C. A.) 258 F. 562. Consequently, the claim for penalties was properly disallowed.

It is insisted, however, that the act of June 18, 1934, subjecting receivers in bankruptcy to liability for the occupational tax should be so construed as to eliminate the prohibition against recovery of penalties provided in section 57j. The language of the act does not support this contention. It applies only to taxes not to penalties. We are not justified in extending its purview.”

unless it be for the fact that in the Illinois case there had been a claim filed. It will be noted that in the Illinois case, as here, the Trustee was not operating the business with the thought of making a profit and conducting the business, but as a step in the liquidation of the estate.

When enacting Section 57 J of the Bankruptcy Act, I think it is clear that Congress intended to include all debts owing to the United States, a state, etc., as a penalty or forfeiture regardless of whether there was a claim filed in the bankruptcy estate or not. Otherwise, there would be numerous opportunities for a governmental agency to avoid and get around the express provisions of said section of the Bankruptcy Act. It is also interesting to note that every other subsection of Section 57 of the Bankruptcy Act [fol. 33] deals with the filing and allowance of claims in the bankrupt estates except subsection 57 J of the Act and instead of this subsection referring to claims, it says “debts



owing to the United States, a state . . . as a penalty or forfeiture shall not be allowed . . .", and Division 1' of Section 1 of the Bankruptcy Act in defining the word 'debt' says "'debt' shall include any debt, demand, or claim provable in bankruptcy". See also Section 17 of the Bankruptcy Act. It is plain that Section 57 J of the Bankruptcy Act refers to debts and not to claims filed in a bankruptcy estate and I am not permitted to give it a narrower interpretation. Therefore, the only conclusion which I am able to come to is that the Department of the State of California above mentioned are not entitled to collect the penalties in question.

The Attorney General seems to take for granted that the State of California has a lien upon the automobiles in question under and by virtue of the section of the Motor Vehicle Act above quoted. This probably would be true had a lien accrued prior to adjudication in bankruptcy but even then the Referee would have jurisdiction to pass upon the validity and amount of said liens. (See the case of *In re Huffel v. Harkelrode*, Treasurer, 18 ABR (N. S.) 730 above cited). But can a lien attach to property in the hands of a trustee in bankruptcy and after adjudication? It will be observed that there was an order of liquidation in this case on December 22, 1936, which was several days before the 1937 fees and licenses in question were due and considerably more than a month before any penalties under and by virtue of the Motor Vehicle Act could attach. Therefore, before the State of California's lien, if any, could attach, the [fol. 34] automobiles in question were in *Custodia Legis*. Section 1449, page 1167, Gilbert's *Collier on Bankruptcy*, Third Edition, says in part—

"Time of Vesting—The title of the bankrupt vests in the trustee "as of the date he was adjudicated a bankrupt," but upon thus vesting relates back to the time of the filing of the petition. While it is true that by subsection a the trustee, upon his appointment and qualification, becomes vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, there are other provisions of the statute which evidence the intention to vest in the trustee the title to such property as it was at the time of the filing of the petition, the estate being considered as *In Custodia Legis* from that time. Therefore, for the purpose of fixing priority as between a trustee in bankruptcy and adversely claiming lien holders the time of

filing the petition is the vital date, and a lien invalid on that date cannot be perfected before adjudication so as to make it valid against the trustee”.

and section 1450 of Gilbert's Collier on Bankruptcy, Third Edition, at page 1169, says in part—

“Title pending appointment of trustee.—In General.—It follows that, under the present law, the legal title to property remains in the bankrupt to the date of the appointment of the trustee, but he becomes a trustee thereof for all the creditors, *and no permanent lien can be acquired upon the property in the interim*, nor can the bankrupt effect any valid transfer of the property, except possibly for full value, in the ordinary course of business. \* \* \*” (Italics ours.)

[fol. 35] In the case of Lazarus, et al., v. Ezra P. Prentice, et al., 32 A. B. R. 559, at page 561, the Supreme Court said:

“The filing of the petition and adjudication in the bankruptcy court in New York brought the property of the bankrupts, wherever situated, into Custodia Legis, and it was thus held from the date of the filing of the petition, so that subsequent liens could not be given or obtained thereon, nor proceedings had in other courts to reach the property, the court of original jurisdiction having acquired the full right to administer the estate under the bankruptcy law.”

See also Volume 5, Remington on Bankruptcy and notes, page 453 thereof.

I am not unmindful of the language used by the 9th Circuit Court of Appeals in the Hisey case above cited wherein it said—“but this liability of the receiver would not relieve the property in his custody from the lien imposed by law”, but it was apparent that the question of the right of the state to a lien after adjudication was not before this court in this case.

I am therefore of the opinion that the State does not have a valid lien under the facts as presented in this case upon the automobiles in question, and more especially since no penalties can be allowed in bankruptcy, the State could not have a lien upon the automobiles in question for the amount of penalties claimed.

The objection of the State of California to the jurisdiction of the Referee in so far as injunctive relief is concerned

[fol. 36] will be sustained without prejudice to the right of the trustee to apply to the Federal Court for any injunctive relief which he feels is appropriate under the provisions of the Bankruptcy Act and Subdivision 3 of General Order 12.

The prayer of the Trustee in seeking a bar order against the Director of the Department of Motor Vehicles and Registrar of Motor Vehicles is granted and said Departments are given thirty days within which to file any claims which they may have or assert against this estate or be forever barred from thereafter asserting same.

There are ample funds in said estate to pay any and all claims which the State of California may file. As herein pointed out, the Department of the State of California above mentioned, cannot successfully assert a lien after the order of liquidation and adjudication in bankruptcy and more especially for the penalties claimed to be due. The trustee is authorized and directed to sell said motor vehicles in question, which are described in his petition and amended petition herein, free and clear of any and all liens claimed by the Director of the Department of Motor Vehicles and the Registrar of Motor Vehicles of the State of California. Counsel for the trustee is directed to prepare appropriate findings and an order in accordance with this opinion.

Dated May 25th, 1937.

Ernest R. Utley, Referee in Bankruptcy.

[fol. 37] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

In Bankruptcy. No. 28563-C

In the Matter of RICHMAID CREAMERIES, INC., a Corporation,  
Debtor

**Findings of Fact and Conclusions of Law and Order—**

Filed June 14, 1937

The above entitled matter came on regularly for hearing before Honorable Ernest R. Utley, Referee in Bankruptcy herein on a petition filed by L. Boteler, Trustee in Bankruptcy herein for an order to show cause requiring Ray Ingels, Director of Motor Vehicles of the State of Cali-

fornia, and Howard E. Deems, Registrar of Motor Vehicles of the State of California to show cause why the penalties assessed against certain motor vehicles described in said petition should not be set aside, and further requiring the respondents in said petition to show cause why the 1937 license plates upon said motor vehicles should not be issued and delivered to said Trustee in Bankruptcy upon the payment of the proper fees exclusive of the penalties. The order to show cause upon said petition was duly issued and made returnable on the 15th day of March, 1937 at 10 o'clock A. M. of said date.

Thereafter, to-wit, on the 8th day of April, 1937, the Trustee in Bankruptcy herein filed an amended petition praying that an order to show cause issue out of this court requiring said Ray Ingels, Director of Motor Vehicles of the State of California and said Howard E. Deems, Registrar of Motor Vehicles of the State of California to appear before this court and show cause why they should not be required to forthwith file such claims as they assert against said bankruptcy estate and the motor vehicles described in said petition and that upon their failure to file such claims that they be forever barred from asserting such claims or claims against said bankrupt estate and/or against the motor vehicles described in said petition and for a further order requiring that the said Ray Ingels, Director of Motor Vehicles of the State of California and said Howard E. Deems, Registrar of Motor Vehicles of the State of California further show cause why the said Trustee in Bankruptcy herein should not be authorized to sell said motor vehicles free and clear from any and all liens claimed by the Motor Vehicle Department of the State of California upon said vehicles.

An order to show cause was issued upon said petition as prayed for. Upon a hearing had before said Referee on the 13th day of April, 1937, at 2 o'clock p. m. of said date, the said Trustee in Bankruptcy appearing with his attorney, David Schwartz, and the respondents herein, Ray Ingels, Director of Motor Vehicles of the State of California and Howard E. Deems, Registrar of Motor Vehicles of the State of California appearing through their attorneys, U. S. Webb, Attorney General and John O. Palestine, Deputy Attorney General, and evidence both oral and documentary was offered and received on behalf of the respective parties and the evidence being closed and the cause having been



submitted to this court for consideration and the court having fully considered the briefs filed by the respective parties herein and having duly considered the same, files its Findings of Fact and Conclusions of Law as follows:

[fol. 39]

## FINDINGS OF FACT

### I

The court finds that on the 16th day of September, 1936 the above named debtor filed its petition under Section 77b of the Bankruptcy Act as amended, and on the same day, pursuant to said petition, the court appointed John H. Chamness temporary trustee with authority to operate the business of the debtor and that said John H. Chamness as temporary trustee operated the creamery business of the debtor until the 20th day of January, 1937.

### II

The court further finds that the business of the debtor was operated at a loss and that on the 10th day of December, 1936, a petition was filed seeking an order to require the temporary trustee to liquidate the estate of said debtor, and that on the 22nd day of December, 1936 such a liquidation was ordered and the case referred to the Honorable Ernest R. Utley, as Referee for further administration pursuant to the provisions of Section 77b of the Bankruptcy Act.

### III

The court further finds that on the 20th day of January, 1937, following a notice duly and regularly given to the creditors of the above named debtor, the present trustee herein, L. Boteler, was appointed as trustee and immediately thereafter duly qualified and took possession of the assets of the debtor including the twenty-seven (27) trucks and automobiles described in the petition.

### IV

The court further finds that when the present trustee took possession of the assets of the debtor, he found him-  
[fol. 40] self in possession of certain milk and ice cream routes which he considered valuable assets providing the same could be held intact until a sale thereof could be consummated and the court further finds that the value of said

milk and ice cream routes would have been completely lost if said trustee had failed to make the usual deliveries of milk and ice cream until such a time as a sale could be consummated.

## V

The court further finds that the trustee herein had absolutely no funds in his possession between the date of his appointment on the 20th day of January, 1937 and the 27th day of February, 1937 with which to purchase the 1937 license plates for said motor vehicles and that in order to prevent the sacrifice and loss of said milk and ice cream routes, the said trustee issued checks against said estate for the payment of milk and other necessary supplies and labor and cashed said checks out of his personal funds, and held said checks until there was sufficient funds in said bankruptcy estate with which to pay the same.

## VI

The court further finds that the said trustee was diligent in advertising and bringing on for sale and confirmation of sale the assets of said estate and that the trustee herein operated said routes merely for the purpose of preserving the assets of the debtor until such time as a desirable sale could be consummated and that said trustee did not operate said motor vehicles for any purpose whatsoever except to preserve the value of the assets of said debtor as represented by said milk and ice cream routes, and that immediately upon the sale of said milk and ice cream [fol. 41] routes heretofore mentioned, the trustee herein tendered to the Department of Motor Vehicles of the State of California, and the Registrar of Motor Vehicles of the State of California, the required registration and license fees upon said motor vehicles as set out in said petition and that the said Department of Motor Vehicles and the Registrar of Motor Vehicles refused to accept the said registration and license fees unless the said trustee paid in addition thereto the penalties provided for by Section 378 of the Vehicle Code of the State of California.

## VII

The court further finds that at no time prior to the 27th day of February, 1937, did said trustee have funds with which to pay said registration and license fees owing upon

said motor vehicles and that the same condition existed from the date that the order of liquidation was made herein, to-wit, the 22nd day of December, 1936 to the date of the appointment of L. Boteler, the present trustee on the 20th day of January, 1937. That during the month of January, 1937 and up to the said 27th day of February, 1937, the trustee herein and his predecessor operated said vehicles upon the public highways of the State of California without the payment of any registration and license fees for said years.

### VIII

The court further finds that the estate of this debtor cannot be expeditiously administered and that the liquidation of said estate will be unduly prolonged unless the trustee herein is in a position to sell said motor vehicles free and clear of any liens or claims against said motor vehicles claimed by the said Ray Ingels, Director of Motor [fol. 42] Vehicles of the State of California, and the said Howard E. Deems, Registrar of Motor Vehicles of the State of California.

### IX

The court further finds that the trustee in bankruptcy herein is entitled to a bar order requiring the said Motor Vehicle Department of the State of California, and/or Ray Ingels, Director of Motor Vehicles of the State of California and the said Howard E. Deems, Registrar of Motor Vehicles of the State of California, and each of them, to file their claim or claims for the registration and license fees owing upon said motor vehicles or be forever barred from asserting any claim or claims for taxes and/or registration and license fees against said motor vehicles.

### CONCLUSIONS OF LAW

As Conclusions of Law, the court finds:

#### I

That the Motor Vehicle Department of the State of California is not entitled to collect the penalties of and from the estate of the debtor herein and that the Motor Vehicle Department of the State of California has no valid lien upon said motor vehicles described in said petition and has no claim against the estate of the debtor herein for any of such penalties.

## II

The court further finds that no valid lien attached against said motor vehicles after the 22nd day of December, 1936, being the date the order of liquidation was made herein.

[fol. 43]

## III

The court further finds that these proceedings as presented do not warrant the Referee herein to restrain the respondents herein nor to compel the said Ray Ingels, Director of Motor Vehicles of the State of California, and said Howard E. Deems, Registrar of Motor Vehicles of the State of California, and the said Motor Vehicle Department of the State of California, to issue said license plates in view of the provisions of Subsection 3 of General Order 12.

## ORDER

In conformity with said Findings of Fact and Conclusions of Law, it is hereby ordered:

That any and all penalties assessed upon or claim against the motor vehicles described in said petition shall be and are hereby set aside and the said trustee herein is hereby ordered and directed to sell said motor vehicles free and clear of any and all claims or liens of the said Ray Ingels, Director of Motor Vehicles of the State of California and the said Howard E. Deems, Registrar of Motor Vehicles of the State of California and the said Motor Vehicle Department of the State of California.

It is further ordered, adjudged and decreed that the Motor Vehicle Department of the State of California and/or Ray Ingels, Director of Motor Vehicles of the State of California and Howard E. Deems, Registrar of Motor [fol. 44] Vehicles of the State of California and each of them be and each of them are hereby ordered to file herein their claim or claims for the registration and license fees owing upon said motor vehicles and against the above named bankrupt estate on or before thirty days from the date of this order or be forever barred from asserting any claim or claims for taxes and/or registration or license fees against said motor vehicles and against this bankrupt estate or the trustee herein, either in his official capacity as such trustee or individually.

It is further ordered, adjudged and decreed that this order shall be without prejudice to the right of the trustee to apply to the Federal Court for any injunctive relief which he feels is appropriate under the provisions of the Bankruptcy Act and Subdivision 3 of the General Order 12.

Done in Open Court this 14th Day of June, 1937.

Ernest R. Utley, Referee.

Approved as to Form as Provided in Rule 44.

U. S. Webb, Attorney General, by John O. Palstine, Deputy Attorney General, Attorneys for Ray Ingels, Director of Motor Vehicles of the State of California and Howard E. Deems, Registrar of Motor Vehicles of the State of California.

[File endorsement omitted.]

[fol. 45] IN UNITED STATES DISTRICT COURT

PETITION FOR REVIEW OF ORDER OF REFEREE IN BANKRUPTCY—  
Filed June 23, 1937

To the Honorable George Cosgrave, Judge of the United States District Court, Southern District of California, Central Division:

Your petitioners, the Motor Vehicle Department of the State of California, Ray Ingels, Director of Motor Vehicles of the State of California and Howard E. Deems, Registrar of Motor Vehicles of the State of California, by and through the Attorney General of said state, respectfully represent as follows:

## I

Prior to September 16, 1936, the above named debtor was engaged in the creamery business in the State of California. Amongst the assets of said debtor were certain milk and ice cream routes, and twenty seven automobiles and trucks used in the business of said debtor, and particularly in connection with the making of deliveries upon said milk and ice cream routes.

## II

On September 16, 1936, the petition of the above named debtor was filed in the above entitled District Court, pur-



suant to the provisions of Section 77-B of the Bankruptcy Act. On the same date, said petition was approved and John H. Chamness was appointed temporary trustee, with authority to operate the business of said debtor.

On September 23, 1936, pursuant to petition therefor duly filed by said temporary trustee, said District Court made [fol. 46] its Order granting said temporary trustee permission to issue Trustee's Certificates to the amount of \$10,000.00 to raise funds for the use of said temporary trustee in the continuance and operation of the business of said debtor.

On October 16, 1936, said temporary trustee filed a report with said District Court of his operations of said business during the first month of his trusteeship. Said report shows that said trustee had borrowed \$2,000.00 on the aforesaid certificates and that during said month his operation of said business had resulted in a loss of \$2865.00.

On December 22, 1936, pursuant to petition theretofore filed and an Order to Show Cause duly and regularly issued thereon, said District Court made its order directing the liquidation of the assets of the above named debtor and appointed said John H. Chamness as temporary trustee for the purpose of such liquidation but with the same powers as previously given said trustee with regard to the operation of the business of said debtor, and further ordered that the administration of said estate generally be and the same was thereby referred to Ernest R. Utley, Referee in Bankruptcy, for further administration pursuant to the provisions of Section 77-B of the Bankruptcy Act, as amended, and particularly with respect to subdivisions (c), (f) and (k) of said section.

On January 5, 1937, the schedule of assets and liabilities of said company was filed herein, showing assets of \$148,380.82 and liabilities of \$87,089.64, including said \$2,000.00 of Trustee's Certificates issued as hereinabove set forth.

[fol. 47] On January 20, 1937, pursuant to notice duly and regularly given to the creditors of the above named debtor, L. Boteler was appointed as trustee herein, and immediately thereafter duly qualified and took possession of the assets of the debtor. Continuously since said time said L. Boteler has been and now is the duly qualified and acting trustee of said estate.

## III

Continuously during the month of January, 1937, and to and including February 27, 1937, said temporary trustee and said trustee, respectively, in order to preserve the full value of the business of the debtor as a going concern pending liquidation, continued to operate the business of said debtor and to make the usual deliveries of milk and ice cream upon the aforesaid milk and ice cream routes of said debtor, and, in that connection, operated the aforesaid automobiles and trucks upon the public highways of the State of California. There thereby became due to the State of California as and for license and registration fees upon said vehicles for the year 1937, fees in the amount of \$410.90. Said fees were due and payable on or before February 4, 1937.

## IV

During the operation of the business of the debtor by the trustee, as aforesaid, he issued checks against the estate herein, for the purchase of milk and for the payment of labor and other expenses in connection with the operation of said milk and ice cream routes. When there were insufficient funds in said estate to pay said checks, said trustee cashed the same out of his own personal funds and held the checks until there were sufficient funds in the bankruptcy estate with which to pay the same. However, [fol. 48] he did not pay to the State of California the 1937 license fees upon said vehicles, in the amount of \$410.90 or at all, but allowed said fees to become delinquent, whereupon, on February 4, 1937, certain cash penalties were added thereto pursuant to the provisions of the California laws providing for said license and registration fees.

## V

On February 28, 1937, said referee herein made an order confirming the sale of the aforesaid milk and ice cream routes, together with milk bottles, milk cases, ice cream cabinets, compressors and other equipment for the sum of \$8260.00. This was the first property sold in said liquidation, and the trustee did not thereafter attempt to operate the business of the debtor.

## VI

On or about February 27, 1937, said trustee applied to the Department of Motor Vehicles of the State of California for the 1937 licenses upon the motor vehicles hereinabove referred to. Said Department of Motor Vehicles demanded the payment of both said fees and said penalties as a condition to the issuance of said 1937 licenses and the transfers requested by said trustee. Said trustee offered to pay said fees but refused to pay any of said penalties added thereto. The licenses and transfers were therefore denied said trustee.

## VII

On March 6, 1937, said trustee filed with said Referee a petition seeking an order to show cause against Ray Ingels as Director of the Department of Motor Vehicles of the State of California and Howard E. Deems, Registrar of [fol. 49] Motor Vehicles of the State of California, and each of them, "to show cause why the penalties assessed against said motor vehicles should not be set aside and why the 1937 license plates upon said motor vehicles should not be issued and delivered to said trustee upon the payment of the fees prescribed by law exclusive of said penalties." In behalf of said officers, the Attorney General of the State of California appeared specially upon said order to show cause issued pursuant to said petition, and objected to the jurisdiction of the Referee to hear and determine the various matters presented by said petition and order to show cause. Said objection was overruled without prejudice to respondents' right to renew said objection at the conclusion of the testimony. The trustee thereupon gave certain testimony, and documentary evidence was offered and received, including the files and records of the above entitled case. At said hearing, said trustee was asked for a statement of his receipts and disbursements as trustee from January 20, 1937, to February 4, 1937, inclusive, but said trustee did not have his records in this regard with him. It was therefore stipulated that said trustee might file with the Referee a statement of receipts and disbursements from January 20, 1937, to February 4, 1937, inclusive, and that such statement would be deemed a part of the evidence taken at said hearing. Thereupon said Attorney General renewed his objection to the jurisdiction of said Referee and the matter was submitted upon briefs.



## VIII

On April 8, 1937, said trustee filed with said Referee an amended petition seeking an order to show cause against the Department of Motor Vehicles of the State of California [fol. 50] and the aforesaid officers thereof, seeking, in addition to the relief prayed for in the aforesaid original petition, an order requiring said Department of Motor Vehicles and said officers thereof to "forthwith file such claims as they assert against this estate and the motor vehicles hereinbefore described on or before a date to be set by this Court, and upon their failure to file such claims that they be forever barred from asserting such claim or claims against this estate or against the motor vehicles hereinbefore described or against the said trustee herein in his official capacity as such trustee or individually," and seeking a further order authorizing said trustee to sell said motor vehicles free and clear of any and all liens claimed by said officers, "upon the payment of registration and license fees without the penalties." At the hearing duly and regularly held upon said order to show cause issued upon said amended petition, the matter was submitted upon the evidence theretofore introduced at the hearing upon said original petition as hereinabove set forth, and subject to the same objection by the Attorney General on behalf of said Department of Motor Vehicles and the officers thereof.

## IX

The Final Report of John H. Chamness as trustee upon the administration of the estate of the above named debtor from September 16, 1936; to January 19, 1937, inclusive, on file herein shows that the total operating loss resulting from the operation of the business of the debtor during said period amounted to \$9641.42. Said Report further shows, however, that from January 1, 1937, to January 19, 1937, inclusive, said trustee received \$10,169.86 in connection with his operation of the business of said debtor, as [fol. 51] aforesaid, and also shows the following disbursements by said trustee from January 1, 1937, to January 19, 1937, inclusive:

[For this statement see Report of John H. Chamness, set out in full in this Transcript.]

## X

On May 4, 1937, said L. Boteler, trustee, filed his First Report and Account, with said Referee. Said Report and Account contains a statement of the receipts and disbursements of said trustee from January 20, 1937, to the date of said Report, and, particularly, shows the following receipts by said trustee from January 20, 1937, to February 4, 1937, inclusive:

Jan. 20	Cash on hand at time of taking charge of business	\$467.97
Jan. 20	Cash sales and collections	459.51
21	"	312.71
22	"	494.90
23	"	388.14
24	"	195.66
25	"	634.10
26	"	379.52
27	"	931.21
28	"	344.95
29	"	566.50
30	"	453.91
31	"	205.71
Feb. 1	"	732.21
2	"	389.48
3	"	466.71
4	"	476.72

[fol. 52] Said Report and Account further shows, particularly, the following disbursement by said trustee from January 21, 1937, to February 4, 1937, inclusive:

[For this statement see Report of L. Boteler, set out in full in this Transcript.]

## XI

On May 25, 1937, said Referee rendered and filed an opinion upon said matters theretofore submitted, as aforesaid, and directed counsel for said trustee to prepare findings in accordance with said opinion, denying certain of the relief prayed for by said petition and said amended petition, and granting certain other relief prayed for therein. Thereafter, on June 14, 1937, said Referee made and filed his findings of fact and conclusions of law. Particularly, said

referee found that "the trustee herein had absolutely no funds in his possession between the date of his appointment on the 20th day of January, 1937 and the 27th day of February, 1937 with which to purchase the 1937 license plates for said motor vehicles" (Findings, Paragraph V), and that "at no time prior to the 27th day of February, 1937, did said trustee have funds with which to pay said registration and license fees owing upon said motor vehicles and that the same condition existed from the date that the order of liquidation was made herein, to wit, the 22nd day of December, 1936 to the date of the appointment of L. Boteler, the present trustee on the 20th day of January, 1937." (Findings, Paragraph VII).

## XII

[fol. 53] Also on June 14, 1937, said referee made and entered his order pursuant to said findings and conclusions. By said order said Referee ordered that any and all penalties assessed upon or claimed against the aforesaid motor vehicles should be and were thereby set aside, and ordered and directed said trustee to sell said motor vehicles free and clear of any and all claims and liens of said Ray Ingels, Director of Motor Vehicles of the State of California, and of said Howard E. Deems, Registrar of Motor Vehicles of the State of California, and of said Motor Vehicle Department of the State of California, and further ordered, adjudged and decreed that said Motor Vehicle Department of the State of California and/or Ray Ingels, Director of Motor Vehicles of the State of California, and Howard E. Deems, Registrar of Motor Vehicles of the State of California, and each of them, be and they were thereby ordered to file herein their claim or claims for the registration and license fees owing upon said motor vehicles and against the above named bankrupt estate on or before thirty days from the date of said order or be forever barred from asserting any claim or claims for taxes and/or registration or license fees against said motor vehicles and against said bankrupt estate or the trustee therein, either in his official capacity as said trustee or individually. Said Referee declined, however, to make any order directing said Department or said officers to receive the principal of said fees in full payment of all sums owing said Department on said vehicles, and declined to enjoin said Department or said

officers from demanding the penalties prescribed by law as a condition to the registration or transfer of said vehicles in [fol. 54] the State of California in 1937, but ordered, adjudged and decreed that said order be without prejudice to the right of the trustee to apply to the federal court for any injunctive relief which said trustee might deem appropriate under the provisions of the Bankruptcy Act and subdivision 3 of General Order XII.

### XIII

Your petitioners respectfully urge, and each of them urges, that said Honorable Ernest R. Utley, Referee in Bankruptcy herein, erred and exceeded his jurisdiction in making his findings as aforesaid, and in granting any of the relief prayed for in said petition and said amended petition, and in making his order as hereinabove set forth, for the following reasons:

(a) That the finding of the referee that neither of the trustees herein had any funds with which to pay, on or before February 4, 1937, the fees in question, is contrary to the law, the evidence and records on file herein.

(b) That the finding of the referee that the trustee is entitled to a bar order requiring the State officers to file a claim for said fees or be forever barred from asserting any claim or claims for taxes and/or registration and license fees against said motor vehicles, is contrary to the law, the evidence and the records on file herein.

(c) That the conclusion of law of the referee that the Department of Motor Vehicles of the State of California has no claim against the estate herein is contrary to the law and the findings of fact.

(d) That the conclusion of law of the referee that said Department of Motor Vehicles is not entitled to collect said [fol. 55] penalties of and from the estate of the debtor herein is contrary to the law and the findings of fact.

(e) That the conclusion of law of the referee that said Department of Motor Vehicles has no valid lien upon the motor vehicles in question is contrary to the law and the findings of fact.

(f) That the order of the referee setting aside any and all penalties assessed upon or claimed against said motor

vehicles is in excess of the jurisdiction of said referee and is contrary to the law and the evidence and is not even warranted or supported by the referee's own conclusions of law.

(g) That the order of the referee directing the trustee herein to sell said motor vehicles free and clear of any and all claims or liens of said Department or of certain officers thereof is in excess of the jurisdiction of said referee and is contrary to the law and the evidence and to the findings of fact and conclusions of law herein.

(h) That the order of the referee requiring said Department and said officers to "file herein their claim or claims for the registration and license fees owing upon said motor vehicles and against the above named bankrupt estate on or before thirty days" from the date of said order or be forever barred from asserting such claim or claims either against said vehicles or against this bankrupt estate or against the trustee herein individually or as such trustee, is in excess of the jurisdiction of said referee and is contrary to the law and the evidence and to the findings of fact and conclusions of law herein.

[fol. 56] Wherefore, your petitioners, feeling aggrieved because of said order of the Honorable Ernest R. Utley, Referee in Bankruptcy herein, granting certain relief to the trustee as hereinabove set forth, pray and each of them prays that such order may be reviewed by said District Court as provided by law, and that said referee prepare his Certificate on Review for that purpose and file the same with said District Court.

Dated: June 22, 1937.

Motor Vehicle Department of the State of California, Ray Ingels, Director of Motor Vehicles of the State of California, and Howard E. Deems, Registrar of Motor Vehicles of the State of California, Petitioners. By U. S. Webb, Attorney General; by John O. Palstine, Deputy Attorney General, Attorneys for Petitioners.

[Endorsed:] Received copy of the within Petition this 23 day of June, 1937, David Schwartz,—E F Attorney for Trustee.

[File endorsement omitted.]



## [fol. 57] IN UNITED STATES DISTRICT COURT

REFEREE'S CERTIFICATE ON PETITION FOR REVIEW—Filed  
July 12, 1937

To the Honorable Judges of the United States District Court:

I, Ernest R. Utley, Referee in Bankruptcy in and for said District, do hereby certify as follows:

That on March 6, 1937, the Trustee herein, L. Boteler, filed a petition for an order setting aside penalties against bankrupt. An order to show cause was entered thereon on March 6, 1937 directing Ray Ingels, Director of Motor Vehicles of the State of California and Howard E. Deems, Registrar of Motor Vehicles of the State of California, to appear before said Referee on March 15, 1937, at 10:00 A. M. and show cause why the prayer of the Trustee should not be granted. The matter came on for hearing on March 15, 1937, and was submitted. On March 23, 1937, a brief was filed by David Schwartz, attorney for the trustee herein. On March 29, 1937, John O. Palstine, Deputy Attorney General, filed the reply brief of Ray Ingels, Director of Motor Vehicles of the State of California, and Howard E. Deems, Registrar of Motor Vehicles of the State of California. On March 30, 1937, a reply brief was filed on behalf of the Trustee. On April 8, 1937, the trustee filed an amended petition for an order setting aside penalties [fol. 58] against the bankrupt, and an amended order to show cause against Ray Ingels, Director of Motor Vehicles of the State of California and Howard E. Deems, Registrar of Motor Vehicles, was entered thereon and the hearing set for the 13th day of April, 1937 at 2 P. M. On March 9, 1937, supplemental memorandum of authorities was filed on behalf of the Trustee. On April 13th, 1937 the matter came on for hearing and was submitted on briefs.

On May 25th, I entered my opinion in said matter and on June 14th, 1937, Findings of Fact and Conclusions of Law and Order was entered, and on June 23, 1937, a petition for review of order of Referee in Bankruptcy was filed by Ray Ingels, Director of Motor Vehicles of the State of California and Howard E. Deems, Registrar of Motor Vehicles of the State of California.

The question for determination is whether or not said order is a proper order.



For the information of the Court, I transmit herewith the following documents:

1. Petition of L. Boteler for order setting aside penalties against bankrupt.
2. Order to show cause.
3. Brief—Trustee.
- [fol. 59] 4. Reply Brief—Ray Ingels and Howard E. Deems.
5. Reply Brief—Trustee.
6. Amended petition for order setting aside penalties against bankrupt.
7. Amended order to show cause.
8. Supplemental memorandum of authorities—trustee.
9. Opinion.
10. Findings of Fact and Conclusions of Law and Order.
11. Petition for Review of order of Referee in Bankruptcy.

Dated: July 12, 1937.

Respectfully submitted, Ernest R. Utley, Referee in Bankruptcy.

[File endorsement omitted.]

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[fol. 60] IN UNITED STATES DISTRICT COURT

REFeree's SUPPLEMENTAL CERTIFICATE ON PETITION FOR  
REVIEW—Filed July 30, 1937

To the Honorable Judges of the United States District Court:

I, Ernest R. Utley, Referee in Bankruptcy in and for said District, do hereby supplement the record heretofore certified in the above entitled proceeding, with the following additional documents:

1. Statement of evidence of proceeding had before the Referee on March 15, 1937.

2. Reporter's transcript of the evidence.
3. Report of John H. Chamness, temporary trustee, filed April 3, 1937.
4. Report of L. Boteler, trustee, filed May 4, 1937.

Reference is also made to the entire file, which will be transmitted to you upon request, which shows the dates on which the property in this estate was sold and the dates on which the trustee first came into possession of any funds which would have been in excess of the operating expenses of this business pending the sale.

July 30, 1937.

Respectfully submitted, Ernest R. Utley, Referee in Bankruptcy.

[File endorsement omitted.]

[fol. 61]      IN UNITED STATES DISTRICT COURT

Present: The Honorable Geo. Cosgrave, District Judge.

No. 28,563-C. Bkey.

In the Matter of RICHMAID CREAMERIES, INC., a Corporation,  
Debtor

ORDER—October 22, 1937

This matter having come before the Court on July 12, 1937, for hearing on order, filed June 26, 1937, directed to Ray Ingels, Director of Motor Vehicles, and Howard E. Deems, as Registrar of Motor Vehicles, etc. to show cause why you have not issued to petitioner as trustee 1937 license plates, certificates of ownership, etc. if you have not already done so, and having been argued by counsel and submitted on briefs to be filed 10 x 10 x 5, the Court, upon consideration thereof, now orders as follows:

Order to Show Cause is granted, and respondents are directed to issue license plates as prayed for and comply with the order. Exception is allowed to the respondents.

This matter also coming before the Court on September 7, 1937, for hearing on motion of L. Boteler, Trustee, for

hearing and determination of the Petition for Review of the order made by the Honorable Ernest R. Utley, on June 14, 1937, pursuant to notice filed August 19, 1937, and submitted on briefs, and said briefs having been filed and duly considered by the Court, the Court now orders as follows:

Petition for review of the Order of the Referee is denied and findings and Order of the Referee are confirmed. Exception is allowed to the Petitioners.

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[fol. 62] IN UNITED STATES DISTRICT COURT

STATEMENT OF EVIDENCE ON APPEAL—Filed January 19, 1938

The above entitled case was submitted to the United States District Court pursuant to a petition for review of an Order of the Referee in Bankruptcy dated the 14th day of June, 1937, directing Ray Ingels, as Director of Motor Vehicles of the State of California, and Howard E. Deems, as Registrar of Motor Vehicles of said State to file with said referee their claim for motor vehicle registration and license fees or be forever barred, and ordering certain vehicles sold free and clear of liens including any lien for said fees, without transferring such lien to the proceeds of such sale, and setting aside certain penalties added to said fees. The petition for review having been denied and the order of the referee confirmed, said Ray Ingels and said Howard E. Deems have duly petitioned for and been allowed an appeal from the order of said District Court.

For the purpose of completing the record in said cause for the purpose of said appeal, and to enable the parties to have the proceedings heretofore had and the findings, conclusions and orders entered herein reviewed on said appeal, it is hereby stipulated that the Court may and the Court does hereby certify that the following enumerated papers and documents, on file herein were certified to this Court by the referee in bankruptcy herein, and constitute the entire evidence herein:

[fol. 63] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 28563-C

In the Matter of RICHMAID CREAMERIES, INC., a Bankrupt

STATEMENT OF EVIDENCE AND PROCEEDINGS AT HEARING  
BEFORE REFEREE ON MARCH 15, 1937

At the hearing before the Referee on March 15, 1937, the following proceedings were had, and the following evidence taken and received:

"The Referee: Estate of the Richmaid Creameries," are you ready in that matter.

Mr. Schwartz: Mr. Boteler take the stand, please.

L. BOTELER, being first duly sworn testified as follows:

Mr. Palstine: Before any testimony is taken in the matter, on behalf of the persons named in the order, we object to the jurisdiction of this court to take any proceedings, pursuant to the petition or the order upon the ground that any order this court would make, would be to restrain the officers of the State of California from performing certain acts imposed upon them by the motor vehicle code. Presuming that the Bankruptcy Act is controlling, and they should not perform the duties imposed upon them by the Motor Vehicle Code, but restrained from performing those duties, that is not a matter which can be ordered by the referee. It is a matter either handled independently by mandamus, or—

[fol. 64] The Referee: You are raising the jurisdictional question to having the matter determined here?

Mr. Palstine: To the jurisdiction of the referee to determine the matter." (Tr. p. 1, ll. 3-26)

"The Referee: I will overrule the objection to the jurisdiction without prejudice to your right to renew your objection at the conclusion of the testimony. You may proceed with the testimony." (Tr. p. 7, ll. 14-18)

Thereupon, Mr. Boteler, having been called as a witness in behalf of said Trustee, and having been first duly sworn, testified as follows:

**Direct-examination:****(In response to questions by Mr. Schwartz)**

I qualified as Trustee in Bankruptcy in this estate on or about January 20th of this year. I have in my possession as such Trustee the motor vehicles described in the petition on file herein. Upon receipt of a letter from Deputy Registrar Bullock of the Motor Vehicle Department in Long Beach setting forth the details of the amount due as fees and penalties for the registration of said vehicles for the year 1937. I tendered to Mr. Bullock a cashier's check in the amount of \$410.90, which was the amount of the fees without penalties. The penalties amounted to \$348.20. Said tender was made after February 4, 1937, and after the date of said letter. (Said letter was thereupon admitted in evidence as Trustee's Exhibit No. 1, and is as follows:

[fol. 65]      **TRUSTEE'S EXHIBIT No. 1**

**"Frank F. Merriam**  
**Governor**

**Ray Ingels**  
**Director**

**(SEAL)****STATE OF CALIFORNIA****DIVISION OF REGISTRATION****OF THE****DEPARTMENT OF MOTOR VEHICLES****Russell Bevans, Deputy Director****Originating from****Long Beach Branch Office****855 Pacific Avenue****Feb. 20, 1937**

**Mr. L. Boetler, Trustee,**  
**Richmaid Creameries, Inc.,**  
**311 Garfield Building,**  
**Los Angeles, California.**

**Dear Sir:**

On December 15, 1936 your Mr. Wood deposited with this office applications for renewal of licenses on 26 vehicles, without fees accompanying same.



When these fees were computed this office notified Mr. Wood of the total amount required for 1937 renewals, then being \$410.90. Payment of these fees was not then made nor have they been paid to this date.

Mr. Wood now informs me that the Richmaid Creameries, Inc., are in bankruptcy and that you are the Trustee [fol. 66] in Bankruptcy, and requests me to communicate direct with you.

Since the required fees were not paid during the 1937 renewal period, which closed on Feb. 4, 1937 at midnight, we are required by law to collect penalties of 100% on the registration fees and 50% on the vehicle license fees; and since the ownership has apparently passed to another legal entity we must require the transfer of the ownership to you as Trustee in Bankruptcy on each vehicle, taking a \$1.00 fee for each vehicle.

The total fees now required in order to license these vehicles for 1937 are as follows:

Registration Fees & VL Fees .....	\$410.90
Regn. Fee Penalties & VLF .....	
Penalties .....	348.20
26 Transfers @ 1.00 .....	26.00
	<hr/>
TOTAL REQUIRED .....	\$785.10

In view of the fact that all these vehicles have been operated illegally since Feb. 4, 1937, you are urged to pay the required fees of \$785.10 and effect the transfers of ownership immediately. For this purpose all the certificates of ownership must be surrendered properly signed over to you as trustee.

Awaiting your prompt response.

Yours very truly, Howard E. Deems, Registrar of Vehicles. By Dana J. Bullock, Dana J. Bullock, Manager Long Beach Branch Office.

[fol. 67] Thereupon the following proceedings were had:

"Mr. Schwartz: Now, after you were appointed trustee, with reference to these trucks, what, if anything was done with them?

A. They were used only to that degree which was necessary following my appointment to bring out an order of liquidation of the assets of the estate.

Mr. Palestine: We object, it calls for a conclusion of the witness as to what was necessary, if he cares to state what he did, that is different.

The Referee: State what you did, Mr. Boteler:" (Tr. p. 12, ll. 13-24)

Whereupon said witness continued his testimony as follows:

After I was appointed Trustee I temporarily continued the operation of the business which was that of buying milk and cream from the distributors, the same as all the grocers do, and distributed to retailers and wholesalers in bottles and cans on numerous routes which the bankrupt was serving at the time of my appointment. I continued that from my appointment until February 28th, the date of the sale of said routes, at which time the Trustee discontinued further use of the trucks.

The reason for continuing the operation of and serving these routes until the date of the sale, was to the end that we could find a buyer; to find a buyer for the good will of the business. I knew that the routes would become valueless if we didn't continue them until they were sold. There were several retail markets and because they must have protection, they were protected thereby. The preservation of the [fol. 68] good will of the business until we found a customer was the general reason, the chief reason for operating the business. We did everything we could to expedite a sale of the routes. We didn't sit down and wait for somebody to come along. We did considerable advertising and finally consummated a sale on February 28th. The motor vehicles are still in my possession.

(In response to question by Referee:)

To my knowledge, they have not been used since the sale of the routes. There were two, the purchaser who bought the good will, operated two or three for a day or two after the sale was consummated until he could acquire his own equipment.

(In response to question by Mr. Schwartz:)

Outside of that they have not been used.

## Cross-examination.

(In response to questions by Mr. Palstine:)

I was not Receiver of the business from January 1st to January 20th, when I became Trustee. My testimony as to use of the motor vehicles between those dates would be hearsay, as I was not connected with the business until my appointment. I took possession of the business on January 20th. Since that time and until we sold the routes and equipment we carried on the business of the bankrupt, and in doing so, used the trucks and other automotive equipment described in Paragraph III of the Petition herein.

Other assets which came into my possession at the time I became Trustee were the real property, buildings, machinery and equipment and miscellaneous refrigeration equipment in the hands of the customers, which was scattered all over the cities of Long Beach, San Pedro and Wilmington.

I do not have before me an itemized detailed statement showing the cash I have handled since I became Trustee. I could prepare such a statement, but I might say with the thought of conveying to your mind what you seek to know, that the receipts when I was appointed and took possession on January 20th, were inadequate to purchase the requirements and pay cash and keep up with the pay roll. The outgo was approximately \$500.00 a day for emergencies until the latter part of the month of January, and the income was not enough to buy the requirements and keep up with the miscellaneous and incidental expenses. The incidental and miscellaneous expenses I refer to were the payroll, particularly, and buying supplies, such as service of the bottles, paying for the use of the bottles. If you are familiar with the dairy business you know how they operate these bottle exchanges. Every seller of milk delivers those bottles to the bottle exchange and they make certain changes and then you have to deliver them to a certain central point when they are picked up by the drivers. We paid the exchanges for that service, they were enormous.

The following proceedings were thereupon had:

“Mr. Palstine: Counsel, will you stipulate that the trustee will prepare a statement of his receipts and disbursements from the time of his appointment to and including February 4, 1937 and that it may then be introduced in lieu of his testimony on that point.

[fol. 70] Mr. Schwartz: It will unnecessarily encumber the record. He can explain the reasons why he didn't pay the license fees before he did offer to pay for them.

The Referee: I don't think your statement would do any harm and Mr. Boteler can prepare such a statement and file it.

Mr. Palstine: The same as your books here and we will be satisfied to accept his statement as an equivalent of his testimony." (Tr. p. 18, ll. 2-17.)

Said witness then continued his testimony on cross-examination as follows:

We will explain such a statement. I might say further that it became necessary myself, from my own funds to pay cash to employees for a week or two after I got in there because of the inadequate daily receipts to keep the pay-roll going and buy the necessary requirements. In other words, the reason for not paying this tax, one reason at least, was the inadequacy of money so to do.

I refused to pay the penalties of \$348.20, demanded by the Long Beach branch manager of the Department of Motor Vehicles of the State of California in their letter of February 20, 1930.

#### Re-direct examination.

(In response to questions by Mr. Schwartz:)

The only thing I refused to pay was the penalties assessed against the motor vehicles.

Thereupon the following proceedings were had:

"The Referee: Any further testimony, gentlemen, other than the statement which Mr. Boteler will prepare:

[fol. 71] Mr. Palstine: None on behalf of the respondents to the petition.

Mr. Schwartz: None, Your Honor.

The Referee: Have you anything further Mr. Schwartz?

Mr. Schwartz: No, but I have two or three cases I would like to cite.

The Referee: Since we have to take this matter under submission because of Mr. Boteler's statement, I would like to have it briefed, and it presents a very interesting point in law, and it certainly presents one which has not arisen

during my experience as a referee and it is one which might frequently arise in the future.

Mr. Palestine: Before the matter is submitted, I renew at this time my objection to the jurisdiction of this court and on that ground I move to strike all the testimony that has been received upon the assumption that there is jurisdiction.

The Referee: That matter will be taken under submission, also." (Tr. p. 19, l. 19—p. 20, l. 14)

(Further discussion between counsel)

"The Referee: Very well, this matter can probably be worked out later, now how much time do you want for the briefs.

Mr. Schwartz: Five days for me, or three if that is ample for you.

Mr. Palestine: I would like five days, because I have a good many other briefs.

[fol. 72] The Referee: Suppose we make it five, five and five.

Mr. Schwartz: And perhaps in the meantime we can work out some arrangement.

The Referee: Submitted on briefs, five, five and five." (Tr. p. 23, ll. 14-24)

It is hereby stipulated that the foregoing constitutes a full and correct statement of the evidence and proceedings at the hearing before the Referee herein on March 15, 1937, and that the same, together with the Report of John H. Chamness, temporary Trustee, filed herein on or about April 3, 1937, and the Report of L. Boteler, Trustee, filed on or about May 4, 1937, may be incorporated in a supplemental certificate to be filed with the District Court herein by said Referee, to be used in connection with the certificate heretofore filed with said Court pursuant to the Petition for Review filed herein on or about July 22, 1937, by the Motor Vehicle Department of the State of California, Ray Ingels, Director of Motor Vehicles of said State, and Howard E. Deems, Registrar of Motor Vehicles of said State.

U. S. Webb, Attorney General, by John O. Palestine, Deputy Attorney General, Attorneys for Petitioners for Review. David Schwartz, Attorney for L. Boteler, Trustee.



[fol. 73] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

In Bankruptcy No. 28563-C

In the Matter of RICHMAID CREAMERIES, INCORPORATED, a Corporation, Debtor

FINAL REPORT, FINAL ACCOUNT AND PETITION FOR DISCHARGE  
BY PERMANENT TRUSTEE

To the Honorable Judges of the District Court of the United States for the Southern District of California, Central Division, and to Honorable Ernest R. Utley, Referee in Bankruptcy:

I

Your petitioner alleges that he is the duly appointed qualified and acting permanent trustee of the estate of Richmaid Creameries, Incorporated, debtor; that he was appointed temporary trustee by an order of the above entitled court and thereafter confirmed and appointed as permanent trustee with authority to operate the business of the debtor, now the bankrupt, Richmaid Creameries, Incorporated.

II

That due to outside influences from the Truck Drivers Union, Local #692, imposed upon Richmaid Creameries, Incorporated, against the wishes of their own employees and by parties not interested financially or otherwise, the Richmaid Creameries was forced to make application for [fol. 74] relief under Section 77-B of the National Bankruptcy Act, in order to protect the interests of the stockholders and creditors from such influences. Under this procedure I was appointed temporary trustee on September 16, 1936, and permanently appointed on November 2, 1936, and served as such until January 19, 1937, during which time I conducted the business as a going concern.

III

Immediately after the temporary appointment on September 16, 1936, the creditors held a meeting and appointed a committee of three to cooperate with the trustee in the operation of the business, realizing however that the busi-

ness was operating at a loss, but taking into consideration the agreement made August 4, 1936, between Richmaid Creameries, Incorporated, and the Milk Institute of Southern California, (with offices in the Chamber of Commerce Building, Los Angeles), wherein they agreed to hold Richmaid Creameries harmless of any losses sustained while this condition with the labor union existed. It was thought advisable for the protection of the stockholders and creditors to operate said business until such time as this condition could be remedied. But failure on the part of the Milk Institute to live up to this agreement caused the Richmaid Creameries to suffer a loss at the hands of said Milk Institute of a large volume of business, resulting in financial losses (shown by Schedule "A" attached) to such extent that it was impossible to continue, and Richmaid Creameries was compelled to file petition for liquidation of the business [fol. 75] on January 19, 1937, at which time Your Honor appointed Mr. L. Boteler as trustee to liquidate.

#### IV

Attached to and a part of this report is a statement of receipts and disbursements, showing the operating losses of this business, together with claims for unpaid salaries, approved bills, etc., covering the period of my trusteeship. The business was operated on a cash basis during this time, and this accrued payroll and other unpaid bills are outstanding as a result of losses in the operation of the business. I believe these statements to be true and accurate, and as the greater part of these claims is for labor and much needed by these former employees, I pray the court to allow these claims at this time, since I understand there are sufficient funds on hand over and above a reserve for state taxes, court costs and other preferred claims to permit of a distribution of these moneys at this time.

#### V

That during the course of my trusteeship, under an order of the District Court I petitioned for leave to borrow money and issue trustee's certificates, but did not borrow the amount of money which I was authorized to borrow, but borrowed only the sum of \$2,000.00, for which I issued trustee's certificates One, Two, Three and Four of the face value of \$500.00 each, total \$2,000.00, no part of which I have paid

or redeemed. That such certificates bear interest at the rate of 5% per annum, and the date of issuance thereof was the 23rd day of September, 1936.

[fol. 76]

## VI

That as trustee I served in that capacity as well as operating the business, and devoted all of my time actually and actively to the business of the debtor; that the reasonable value of my services is \$300.00 per month, which for the period of September 16, 1936 to January 20, 1937 is four months and five days, and amounts to \$1249.00. That I have drawn during the time I acted as trustee, for my living expenses and which should be credited to and on account of the amount of \$1249.00, the sum of \$439.36.

## VII

The attached schedule "A" heretofore referred to shows the total receipts and the total disbursements from September 16, the time your petitioner commenced his duties as temporary trustee, to January 19 when he ceased to be permanent trustee and delivered the assets to the liquidating agent and liquidating trustee, L. Boteler.

## VIII

There is attached hereto a list of accrued payroll remaining unpaid, to-wit, for services rendered during the temporary and permanent trusteeship of your petitioner. That your petitioner paid payroll to the limit of his cash ability during his trusteeship, but the attached Schedule "B" pages one and two show the name and amounts due to labor for labor actually performed during the administration of your trustee, which claims are preferred labor claims and costs of administration and should be paid out of the funds in the hands of the trustee without further delay. That the said preferred labor claimants have filed [fol. 77] herein their individual claims for labor, claiming preferences. That during the course of administration of your trustee he has incurred debts which are prior debts and costs of administration, to the following persons at the following addresses and the following amounts, to-wit, Schedule "C" attached hereto.

## IX

That in the course of the operating of the business there have been issued quantity discount memoranda to whole-sale trade, which remain unpaid by the debtor and which have not been taken up by the debtor concern. That all of the said credit memoranda were issued in the course of operating the business and are now outstanding in favor of the following persons and in the following amounts, to-wit, as are shown on Schedule "D"; that the same are preferred claims of the administration.

Wherefore, petitioner prays that this, his final report and account as temporary trustee and permanent trustee be approved, that his compensation be fixed in the sum of \$1249.00 for acting as permanent and temporary trustee and for operating the business. That the court may make its order directing the present trustee to pay the costs of administration incurred as shown in the report and account, and that your petitioner may be discharged from his trust and his bond cancelled.

\_\_\_\_\_, \_\_\_\_\_, Petitioner.

[fol. 78] UNITED STATES OF AMERICA,  
STATE OF CALIFORNIA,

COUNTY OF LOS ANGELES, ss:

John H. Chamness, being by me first duly sworn, deposes and says that he is the petitioner in the above entitled matter; that he has read the foregoing Final Report and Account and Petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters he believes it to be true.

John H. Chamness.

Subscribed and sworn to before me this — day of  
April, 1937. — — —, Notary Public in and for  
the County of Los Angeles, State of California.

[fol. 79] STATEMENT OF RECEIVERSHIP OF THE RICHMOND  
CREAMERIES, INC.

Receipts & Disbursements from Sept. 16, 1936 to Jan. 19,  
1937

Receipts	Disbursements
Sept. 16 to Oct. 1 .....	\$7,320.73
Oct. 1936 .....	15,568.56
Nov. 1936 .....	18,801.89
Dec. 1936 .....	18,145.19
Jan. 1 to Jan. 19, 1937 .....	10,169.86
Total receipts .....	70,006.23
Products Purchased, milk, cream, butter and other supplies Sept. 16 to Oct. 1, 1936 .....	\$5,704.86
Payroll .....	2,098.63
Power, light, water, telephone, rents, garage supplies, etc. ....	1,271.23
Nov. 1936 Products purchased .....	12,707.78
Payroll .....	5,198.80
Other expenses .....	3,668.83
Oct. 1936 Products purchased .....	10,180.13
Payroll .....	4,401.89
Other expenses .....	3,401.59
Dec. 1936 Products purchased .....	10,913.04
Payroll .....	5,174.42
Other expenses .....	2,150.27
Jan. 1 to Jan. 19, 1937 Products purchased .....	6,410.06
Payroll .....	2,642.18
Other expenses .....	1,121.96
Insurance, Williams & Co. Wlm. ....	160.23
Pacific Coast Club, Lions Club, Kiwanis .....	93.75
[fol. 80] Neon Signs .....	79.00
Insurance, Tom Mañon Co. ....	65.80
Rent, Garage in Wlm. ....	70.00
Rent, Parking lot and Shed .....	30.00
Store Rent, Long Beach .....	438.00
Southern Calif. Safe Co. ....	72.01
Long Beach Chamber of Commerce .....	6.50
Kuster, Wetzel Electrician .....	1.78
Comalac Service, Milk Bottle Rentals .....	102.28
Amazola Products .....	2.16



	Disbursements
Long Beach Advertising Club & Better Business Bureau .....	7.00
Robert Johnson, Milwaukee, Wis. ....	23.71
Los Angeles Bottle Exchange .....	308.00
Trade Discounts allowable on wholesale sales ..	599.41
Estimated state tax on old age pension .....	1,000.00
<b>Total</b> .....	<b>80,105.30</b>
Less Amount paid on automobiles during receivership .....	457.65
<b>Total</b> .....	<b>79,647.65</b>
Less Receipts as shown above .....	70,006.23
<b>Operating Loss</b> .....	<b>\$9,641.42</b>

#### SCHEDULE "A"

[Schedule "B" enumerates 34 persons to whom, respectively, are owing sums ranging from \$7.04 to \$323.58, and in the total amount of \$4,633.53 for accrued payroll during the period from September 16, 1936, to January 19, 1937, inclusive, as recited in Paragraph VIII of the foregoing Final Report of John H. Chamness.]

[fol. 81] Rupert B. Turnbull, 400 Title Insurance Bldg., Los Angeles, California.

Advanced for court costs and court expenses for the trustee in the course of his administration as follows:

To Clerk of the Superior Court, filing fee Chamness and Richmond vs. Golden State, et al. ....	\$7.00	
To balance (original bill \$15.00 partially paid) to John F. Walles, services and mileage on seven defendants in Chamness vs. Golden State .....	8.50	
Western Union Telegraph Company, Los Angeles, California .....	.40	15.90
Arthur Bond, agent United States Fidelity & Guaranty Company, premium on bond, balance (111 West 7th St., Los Angeles, California) .....		50.00

Southern California Edison Co., 139 E. 3rd Long Beach, California	137.12
Electric Products, 1112 Venice Blvd., Los Angeles, Cal.	161.20
Tucker & Co., Long Beach, Calif., 123 E. 1st St., (plate glass insurance)	10.69
Long Beach Credit Association, Long Beach, Calif. Jergins Trust Building	21.20
J. W. Okley, 526 Security Bldg., Los Angeles, Calif. Sept. 16-Jan. 20	21.00
F. F. Fierce, rent storage room, 244 E. 4th St., Long Beach, California, Jan. 1st to 20th	10.00
[fol. 82] Associated Telephone Company, Long Beach, California, 12/26/36 to 1/20/37—547 Elm Avenue	34.20
Better Business Bureau of Long Beach, 1200 Hartwell Building, Long Beach, California Nov. 1936 1/20/37	9.00
Mrs. Roggaro, R. F. D. No. 1, San Pedro, Calif. Milk Independent Milk Association, 117 W. 9th St., Los Angeles, California	569.15
Helen J. Kirkpatrick, C/o George Taubman, Attorney, Security Building, Long Beach, California	148.87
Comolac Services, 1236 Compton, Los Angeles, Calif.	187.50
Milk Institute of Southern California (4th Fl.) Chamber of Commerce Bldg., Los Angeles, California	262.82
Challenge Cream & Butter Association, Los Angeles California, 929 E. 2nd St., Los Angeles	36.36
Press Telegram, 5th & Pine Ave., Long Beach, Calif.	624.39
Long Beach Chamber of Commerce, 249 American Ave., Long Beach	6.00
	8.82

#### SCHEDULE "C" (Page 1)

Crescent Towel Supply, 1627 South Broadway, Los Angeles, Calif. Aug., Sept.	10.84
Chocolate Products, 741 Kohbe St., Los Angeles, Cash purchases Nov. 2, 1936	2.00
[fol. 83] Griffen Hassen Laboratories, 650 E. 20th St., Los Angeles, California August 14	2.50
Eddies, 850 El Centro, South Pasadena, California	6.50

Moore & Sons, 146 Locust Ave., Long Beach, California		
Nov. 1—10M daily reports	70.00	
10M retail reports	72.50	142.50
Home Ice & Cold Storage Co., 625 W. Anaheim Ave., Long Beach, California		
		77.25
Greens, Inc., 542 Pine Avenue, Long Beach, Calif.		
Oct. 8—2500 R. M. D. cards		12.88
Long Beach Kiwanis Club, 37 Pine Avenue, Long Beach, California October, November, December, 1936		
		23.50
Tom Maison, Inc. Co., 303 Avalon, Wilmington, Calif. 2 insurance policies 65.80 7.74)		
		73.54
Estimated tax on State Old Age Pension		1,000.00
Milk Institute of Los Angeles, Trustee's Certificates, Chamber of Commerce Building, Los Angeles		
		2,000.00
		<hr/>
		\$5,665.73

#### SCHEDULE "C" (Page 2)

[Schedule D enumerates 43 persons and/or businesses to whom, respectively, are owing sums ranging from ninety-eight cents to \$11.46, and in the total amount of \$316.26, for the discounts specified in Paragraph IX of the foregoing Final Report of John H. Chamness.]

[fol. 84] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA

In the Matter of RICHMAID CREAMERIES, INC., Debtor

FIRST REPORT AND ACCOUNT OF L. BOTELER, TRUSTEE, PETITION FOR EXPENSES AND DIVIDEND

To the Honorable Ernest R. Utley, Referee in Bankruptcy:

The verified report and account of L. Boteler respectfully shows:

#### I

That he is the duly qualified and acting Trustee for the estate of the above named debtor.

## II

That your Petitioner qualified with a bond in the sum of \$20,000.00 as fixed by the Court herein and immediately took charge of and continue the operation of the debtor's business—that of a creamery located at 120 G Street, Wilmington, California, and placed his Agent, A. J. Johnson in charge.

[fol. 85]

## III

That upon completion of physical inventory and according to the debtor's records your petitioner found assets as follows:

Employees' notes receivable approximately	\$3500.00
Accounts receivable	7500.00
Merchandise consisting of ice cream, milk, cream, butter, refrigeration, ice cream and auto supplies	1678.23
Merchandise consisting of containers, bottle caps, bags, caps, etc.	2341.87
Plant machinery	18382.20
Motor trucks, bodies and car	6945.91
Garage equipment	351.00
Bottles, cases, cans at 120 G Street	2326.78
Ice cream cabinets on territory and storage	4868.49
Office Furniture and fixtures 120 G St. Wilmington	\$674.50
Office furniture Long Beach Office	551.25

## Real Estate:

Equity in real property located at 120 G St. Wilmington, California.

## VI

As it was apparent from the report of John H. Chamness, former trustee herein, that the debtor's business was losing money and also apparent to your petitioner that there was no purpose in continuing the operation of the [fol. 86] debtor's business any longer than absolutely necessary to the end that the assets be disposed of to the best advantage, your petitioner first advertised the creamery for sale in the local newspaper as a going concern and made inquiry among the members of the industry locally

**MICRO CARD**

TRADE

MARK



**22**

**39**



**1041**

**65**





but was unable to find any one ready, able and willing to make a reasonable offer for said business as a going concern. Next, your petitioner made a canvass among the various firms in the industry in an attempt to sell the good will of the business together with a list of customers and on or about the middle of February, 1937, your petitioner obtained a sound offer from the Mountain View Dairies of Long Beach, California, of \$8250.00 for the good will, all of the bankrupt's right, title and interest in and to the use of trade name "Richmaid" together with lists of customers, bottles, cans, bottle crates, and ice cream cabinets loaned by the debtor to various ice cream customers and certain automotive equipment. Your petitioner then issued upwards of 700 letters to various members of the industry up and down the state of California as well as to various creameries in Arizona and Nevada advising that the assets would be offered for sale in open Court on February 25, 1937, and also advertised said offering of assets for sale in the Los Angeles Daily Journal and sent notices to various local speculators.

[fol. 87]

V

That said offering of assets for sale duly came on for hearing before this Court on February 25, 1937, and the following bids for a portion of the assets were duly confirmed, to-wit:

O. R. Parson, one ice cream hardening box and compressor .....	\$300.00
Mountain View Dairies, Long Beach, for good will, right to use trade name, list of customers, bottles, cans and bottle crates, certain ice cream cabinets and certain automotive equipment .....	8250.00
Mountain View Dairies merchandise consisting of milk and milk products .....	585.93
Mr. and Mrs. C. A. Lynch doing business as Richmaid Cafe for all of the debtor's right, title and interest in leasehold on the premises at corner 4th and American Avenue, Long Beach, California, together with trustee's right, title and interest in and to restaurant fixtures therein subject to balance due, secured by conditional sales contract .....	600.00

After confirmation of the foregoing your Petitioner then offered all of the remaining physical assets for sale for which Michael Tauber of this city bid the sum of \$8,000.00 free and clear, excepting only the real property which offer your petitioner respectfully represented to this Court was inadequate, and then asked leave of and obtained permission [fol. 88] from this court to sell the remaining assets at private sale. That thereupon your petitioner delivered over the property sold and discontinued further operation of the business, but continued his agent A. J. Johnson in charge and up to this time has sold machinery, and equipment piece meal which together with sales confirmed in open Court on February 25, 1937, makes a total of \$22,645.47. Your petitioner still has on hand to sell the following:

Approximately 18 automobile trucks and delivery cars

1—Large bottle washer machine

1—Pastuerizer

Various other items of equipment and office furniture together with debtor's equity in real estate at Wilmington, California. The best offer for the real estate had as of this date is the sum of \$1,000.00.

#### IV

That in the meantime your petitioner has caused diligent efforts to be made to collect outstanding accounts receivable and has collected various sums and amounts as set forth in petitioner's report and account of receipts and disbursements Marked Exhibit "B" hereto attached and made a part hereof.

#### VII

That with leave of this Court your petitioner has paid labor claims amounting to the sum of \$4575.96 said labor claims having arisen prior to your petitioner's appointment herein.

[fol. 89]

#### VIII

That John H. Chamness, former trustee, appears to have incurred debts during the period of his operations under order of this Court in the approximate sum of \$5600.00 which are unpaid to date, together with the amount due

the Department of Employment, State of California and Internal Revenue Service amounting to upwards of \$1,000.00. Your Petitioner respectfully prays that the Court instruct him at the hearing of this report and account relative to payment of same.

### IX

That your petitioner respectfully represents that his action in continuing operation of the business from January 19, 1937, to and including March 13, 1937, while resulting in a nominal operating loss, said operation did result in your petitioner consummating a sale of customers, good will and trade name, together with bottles, cans, crates, etc. scattered all over the cities of Wilmington and Long Beach and resulted in recovery for this estate which otherwise would not have resulted had your petitioner immediately discontinued operation of the business at the time of his appointment.

### X

That attached hereto and marked Exhibits "A" and "B" is a complete and true account of all receipts and disbursements together with a list of expenses, fees and allowances to be fixed, established and ordered paid herein.

### XI

That during the period of operation from January 19th to March 13th your trustee sold merchandise and collected [fol. 90] on outstanding accounts receivable the sum of \$25,776.28.

### XII

That your Trustee be allowed as partial payment on account of his statutory fee the sum of \$300.00 and in addition thereto your petitioner asks that he be allowed the sum of \$624.32 on account of operating the business (based on a total of \$48,432.37 receipts to date) together with the sum of \$40.00 representing general office, expense, telephone bills, general stenographic and clerical hire, postage, stationery, etc. as set forth in Exhibit "C" herein.

### XIII

That during the administration of said estate, it was necessary for your petitioner to employ counsel to consult

concerning legal matters arising in said administration. That upon Court Order your trustee employed David Schwartz, attorney at law of Los Angeles, California, who has rendered valuable service to your petitioner herein and who has agreed to accept as compensation for such services the amount fixed and ordered paid by this Court.

Wherefore, your Trustee prays that an order be made allowing and approving his First Report and Account, fixing establishing allowing and ordering paid the expenses, fees and allowances to be fixed, established, allowed and ordered paid herein, and declaring first dividend to creditors.

[fol. 91]      EXHIBIT "B" TO FIRST REPORT

Operating Statement of Business at 120 West G Street,  
Wilmington, Cal.

Receipts

1937.

January

20	Cash on hand at time of taking charge of business	\$467.97
20	Cash sales and collections	459.51
21	Cash sales and collections	312.71
22	Cash sales and collections	494.90
23	Cash sales and collections	388.14
24	Cash sales and collections	195.66
25	Cash sales and collections	634.10
26	Cash sales and collections	379.52
27	Cash sales and collections	931.21
28	Cash sales and collections	344.95
29	Cash sales and collections	566.50
30	Cash sales and collections	453.91
31	Cash sales and collections	205.71

February

1	Cash sales and collections	732.21
2	Cash sales and collections	389.48
3	Cash sales and collections	466.71
4	Cash sales and collections	476.42

[fol. 92]

## Disbursements

1937.

January

21	L. A. Bottle Exchange, bottles	\$20.88
	W. A. Thompson, milk products	13.18
	F. A. Roggero, milk products	100.00
	Joe Duarte, milk products	60.00
	Knudsen Creamery, cheese	5.18
	Elmore Lambing, gas (and oil)	16.88
	Challenge Creamery, cream and butter	175.37
	Petty cash, disbursed cash as per itemized list in files	23.35
	C. F. Larson, on payroll account	20.00
	Deduct returned check	1.50
20	F. A. Roggero, milk products	100.00
	Joe Duarte, milk	60.00
	W. A. Thompson, milk	24.63
	J. L. Wood, petty cash fund	15.00
	Challenge Creamery, cream and butter	176.37
	Elmore Lambing, gas	16.88
	Western Stopper Company, milk caps	10.06
22	Disbursed from petty cash as per itemized list in files	23.04
	W. A. Thompson, milk	11.59
	Knudsen Creamery Company, cheese	5.18
	Challenge Creamery, cream and butter	101.38
	Elmore Lambing, gas	16.88

[fol. 93]

	Joe Duarte, milk	60.00
	F. A. Roggero, milk	100.00
	Mountain View Dairies, cream	67.57
	C. L. Holbert, payroll account	10.00
23	W. A. Thompson, milk	11.59
	Knudsen Creamery, cheese	5.75
	Challenge Creamery, cream and butter	71.98
	Elmore Lambing, gas	20.25
	Duarte, milk	60.00
	Roggero, milk	100.00
	Mountain View, cream	50.62
	Disbursed from petty cash as per itemized list in files	16.78
24	W. A. Thompson, milk	11.59



## Disbursements—Continued

1937.

## January

	Mountain View, cream	67.57
25	W. A. Thompson, milk	11.59
	Knudsen Creamery, cheese	10.14
	Challenge Creamery, cream and butter	218.31
	Elmore Lambing, gas	16.88
	Duarte, milk	120.00
	Roggero, milk	200.00
	Mountain View, cream	67.57
	Bergan Tire Company, tire and oil	14.42
	Western Stopper Company, milk caps	32.48
26	W. A. Thompson, milk	11.59
	Knudsen Creamery, cheese	3.54
	Challenge Creamery, cream and butter	105.83
	Elmore Lambing, gas	16.88
	Duarte, milk	60.00
	Roggero, milk	100.00

[fol. 94]

26	Mountain View, cream	\$67.57
	Disbursed from petty cash as per itemized list in files	37.81
	Gas Company, natural gas	17.98
	Bureau of Power & Light, water and power	49.10
	L. A. Bottle Exchange, bottles	28.08
	Deduct returned check	6.00
27	Disbursed from petty cash as per itemized list in files	8.59
	W. A. Thompson, milk	11.59
	Knudsen Creamery, cheese	5.94
	Challenge Creamery, cream and butter	124.53
	Elmore Lambing, gas	16.88
	Duarte, milk	60.00
	Roggero, milk	100.00
	Mountain View, cream	50.68
28	Disbursed from petty cash as per itemized list in files	9.11
	W. A. Thompson, milk	11.59
	Knudsen Creamery, cheese	6.52
	Challenge Creamery, cream and butter	115.74
	Elmore Lambing, gas	20 25

## [fol. 95] Disbursements—Continued

1937.

## January

Duarte, milk	60.00
Roggero, milk	100.00
Mountain View, cream	67.57
Frigid Products, ice cream bars	17.20
Marguerite Wood, payroll account	30.41
Marie Klauser, " "	16.68
A. C. Lenon " "	39.24
E. C. Stuart " "	33.35
Al Henderson " "	29.43
Andrew Tate " "	30.41
C. F. Larson " "	29.43
R. L. Chamness " "	49.05
J. L. Wood " "	49.05
H. M. Coffey " "	40.22
O. S. Peterson " "	19.62
C. H. Bucy " "	34.33
Don Bucy " "	14.71
Ralph Spainhour, " "	34.33
Miriam Farr " "	15.70
Capitola Davidson " "	9.81
John Vatan " "	19.62
J. W. Walsh " "	40.22
H. A. Lee " "	40.22
Riley Patton " "	36.30
Chas. K. Koski " "	26.49
H. R. Chamness " "	26.49
S. Arthur Foster " "	34.33
Wm. Woestman " "	27.47
Glyn Nugent " "	29.43

[fol. 96]

28 Don Sorenson, payroll account	\$33.35
Geo. H. Fortner " "	9.81
D. E. Steele " "	9.81
Chas. L. Holbert " "	19.62
J. W. Wasson " "	31.39
J. H. Chamness " "	49.05
29 Disbursed from petty cash as per itemized list in files	21.27
W. A. Thompson, milk	11.59
Knudsen Creamery, cheese	4.98

## Disbursements—Continued

1937.

## January

	Challenge Creamery, cream and butter	90.58
	Elmore Lambing, gas	16.88
	Duarte, milk	60.00
	Roggero, milk	100.00
	Mountain View, cream	75.47
	Western Stopper, milk caps	10.06
30	Disbursed from petty cash as per itemized list in files	20.74
	W. A. Thompson, milk	11.59
	Knudsen Creamery, cheese	6.49
	Challenge Creamery, cream and butter	102.23
	Elmore Lambing, gas	20.25
	Duarte, milk	60.00
	Roggero, milk	100.00

{fol. 97}

	Mountain View, cream	50.68
	O. J. Weber, cream caps	11.50
31	W. A. Thompson, milk	11.59
	Mountain View, cream	75.07
	Bank charges	14.23

## February

1	Disbursed from petty cash as per itemized list in files	22.45
	W. A. Thompson, milk	11.59
	Knudsen Creamery, cheese	7.70
	Challenge Creamery, cream and butter	173.27
	Elmore Lambing, gas	20.25
	Duarte, milk	120.00
	Roggero, milk	200.00
	Mountain View, cream	99.15
2	Petty cash disbursed as per filed list	44.21
	Thompson, milk	11.59
	Knudsen Creamery, cheese	5.94
	L. A. Bottle Exchange, bottles	18.00
	Western Stopper, milk caps	10.06
	King Extract Company, flavoring	13.75
	Frigid Products, ice cream bars	11.20
	Challenge Creamery, cream and butter	128.58
	Elmore Lambing, gas	20.25

## Disbursements—Continued

1937.

February

Duarte, milk	60.00
Roggero, milk	100.00
Mountain View, cream	96.83
Gas Company, natural gas	17.42
Bureau of Power and Light, water and power	49.43

[Col. 98]

3 Petty cash disbursed as per filed list	\$4.03
Thompson, milk	11.59
Knudsen Creamery, cheese	6.38
Challenge Creamery, cream and butter	42.85
Elmore Lambing, gas	16.88
Duarte, milk	60.00
Roggero, milk	100.00
Mountain View, cream	101.65
4 Petty cash disbursed as per filed list	24.63
Thompson, milk	11.59
Knudsen Creamery, cheese	6.12
Challenge Creamery, cream and butter	103.58
Elmore Lambing, gas	16.88
Duarte, milk	60.00
Roggero, milk	100.00
Mountain View, cream	95.03
J. V. Moore, rent 254 E. 4th, L. B.	204.00

## [fol. 99] STIPULATION FOR APPROVAL OF STATEMENT OF EVIDENCE

It Is Hereby Stipulated and Agreed, by and between the attorneys for the appellants Ray Ingels, as Director of Motor Vehicles of the State of California, and Howard E. Deems, as Registrar of Motor Vehicles of said State, and the attorney for the appellee, L. Boteler, trustee of Richmaid Creameries, Inc., Bankrupt, that the foregoing Statement of Evidence has been presented in time; that in conjunction with the judgment roll it fully and correctly sets forth all the facts put in evidence and proceedings had in this action material to the appeal of said appellants; that it may be approved, allowed and settled by the Judge of the above en-

titled Court as correct and complete in all its respects, and that the same shall be made a part of the record in said case and be the Statement of Evidence therein.

U. S. Webb, Attorney General, by John O. Palstine,  
Deputy Attorney General, Attorneys for Ap-  
pellants: David Schwartz, Attorney for Appellee.

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[fol. 100] IN UNITED STATES DISTRICT COURT

ORDER SETTLING AND APPROVING STATEMENT OF EVIDENCE

The foregoing Statement of Evidence duly proposed and agreed upon by counsel for the respective parties, is presented in time and is full, complete and correct in all respects, and constitutes all of the evidence herein relating to the appeal by the above named appellants, and is hereby approved, allowed and settled within the judgment term, and made, and shall be printed as, a part of the record herein for purposes of said appeal herein.

Dated this 19th day of January, 1938.

George Cosgrave, United States District Judge.

[File endorsement omitted.]

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[fol. 101] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 28563-C

In the Matter of RICHMAID CREAMERIES, INC., a Corporation,  
Debtor

PETITION FOR APPEAL AND ORDER ALLOWING APPEAL—Filed  
November 20, 1937

To the Honorable George Cosgrave, Judge of the United States District Court, Southern District of California, Central Division:

Ray Ingels, Director of Motor Vehicles of the State of California, Howard E. Deems, Registrar of Motor Vehicles of said State, and the Motor Vehicle Department of said State of California, respondents to an Order to Show Cause



issued by the Referee in the above entitled proceeding, feeling themselves aggrieved by the order of the above court, entered herein on October 22, 1937, confirming, and denying the petition of the said respondents for a review of, that certain order of the Honorable Ernest R. Utley, Referee herein, dated June 14, 1937, ordering the Motor Vehicle Department of said State and said officers thereof to file in said bankruptcy proceeding their claim for registration and license fees owing upon motor vehicles operated by the trustee of the above named bankrupt estate, before thirty days from the date of said order or be forever barred, and ordering any and all penalties assessed in connection with [fol. 102] said license fees to be set aside, and setting said penalties aside, and ordering the trustee to sell said motor vehicles free and clear of any and all liens of said Department of Motor Vehicles or said officers, and overruling the objection of said Department and said officers to the summary jurisdiction of said Referee.

Pray for the Allowance of An Appeal from said order and each and every part thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignments of Error filed herewith, and prays that citation be issued as provided by law and that a transcript of the record, proceedings and documents upon which said order was based, duly authenticated, be sent to said Circuit Court of Appeals under the rules of such court in such cases made and provided, and prays that an order be made fixing the amount of any bond required of appellant herein.

Dated: November 20, 1937.

U. S. Webb, Attorney General, by John O. Palstine,  
Deputy Attorney General, Attorneys for Ray  
Ingels, Director of Motor Vehicles of the State of  
California, Howard E. Deems, Registrar of Motor  
Vehicles of the State of California, and the Motor  
Vehicle Department of the State of California, Ap-  
pellants.

[fol. 103] ORDER ALLOWING APPEAL

Upon reading the foregoing petition for appeal and upon the files and records herein,

It Is Ordered that an appeal be, and the same is hereby allowed to Ray Ingels, Director of Motor Vehicles of the

State of California, Howard E. Deems, Registrar of Motor Vehicles of the State of California, and the Motor Vehicle Department of the State of California, to have the United States Circuit Court of Appeals, for the Ninth Circuit review the order of this court dated October 22, 1937, confirming and denying the petition of said appellants herein for a review of, that certain order of the Honorable Ernest R. Utley, Referee herein, dated June 14, 1937, ordering the Motor Vehicle Department of said State and certain officers thereof to file in said bankruptcy proceeding their claim for registration and license fees owing upon motor vehicles and against the above named bankrupt estate, before thirty days from the date of said order or be forever barred, and ordering any and all penalties assessed in connection with said license fees to be set aside, and setting said penalties aside, and ordering the trustee to sell said motor vehicles free and clear of any and all liens of said Department of Motor Vehicles or said officers, and overruling the objection of said Department and said officers to the summary jurisdiction of said Referee; And,

[fol. 104] It Is Further Ordered that citation be issued as provided by law, and that a transcript of the record, exhibits, statement of evidence, stipulation, pleadings, and all proceedings herein be prepared by the clerk of this court and transmitted to said Circuit Court of Appeals, so that he shall have the same in said Circuit Court within thirty days of this date, or such time as may be provided by further order of this court.

It Is Further Ordered that cost bond in said appeal be and the same is hereby fixed in a sum of two hundred and fifty Dollars (\$250.00), the clerk to approve said bond.

Dated: November 20, 1937.

Geo. Cosgrave, Judge.

[fol. 105] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed November 20, 1937

Come Now Ray Ingels, Director of Motor Vehicles of the State of California, Howard E. Deems, Registrar of Motor Vehicles of the State of California, and the Motor Vehicle Department of said State of California, appellants herein, and respectfully urge that the above entitled court erred in making its order of October 22, 1937, confirming, and deny-

ing the petition of said appellants for a review of, that certain order of the Honorable Ernest R. Utley, Referee herein, dated June 14, 1937, and relating to the payment of license fees and penalties thereon for the operation of certain automotive equipment of the bankrupt upon the public highways of the State of California, and present, in connection with their petition for appeal from said order, the following assignments of error:

## I

That the finding of the referee that neither of the trustees herein had any funds with which to pay on or before February 4, 1937, the fees in question, which finding was not disapproved or modified by the District Court, is contrary to the law, the evidence and records on file herein.

## II

That the finding of the referee, which was not disapproved or modified by the District Court, that the trustee is entitled [fol. 106] to a bar order requiring the appellant state officers to file a claim for said fees or be forever barred from asserting any claim or claims for taxes and/or registration and license fees against said motor vehicles, is contrary to the law, the evidence and the records on file herein.

## III

That the conclusion of law of said referee, which was not modified or rejected by said District Court, that the appellants herein had no claim against the estate herein, is contrary to the law and the findings of fact.

## IV

That the conclusion of law of the referee, which conclusion was not modified or rejected by said District Court, that said Department of Motor Vehicles had no valid lien upon the motor vehicles in question, is contrary to the law and the findings of fact.

## V

That the order of said Referee, as confirmed by said District Court, setting aside any and all penalties assessed upon or claimed against said motor vehicles, is in excess of the jurisdiction of said Referee, and said court, and is contrary to the law and the evidence, and is not warranted or supported by the Referee's own conclusions of law.

## VI

That the order of the Referee, confirmed by said District Court, directing the trustee herein to sell said motor vehicles [fol. 107] free and clear of any and all claims or liens of the appellants, is in excess of the jurisdiction of said Referee and said court, and is contrary to the law and the evidence and to the findings of fact and conclusions of law herein.

## VII

That the order of the Referee, as confirmed by the District Court herein, requiring said appellants to "file herein their claim or claims for the registration and license fees owing upon said motor vehicles and against the above named bankrupt estate on or before thirty days" from the date of said order or be forever barred from asserting said claim or claims either against said vehicles or against this bankrupt estate or against the trustee herein individually or as such trustee, is in excess of the jurisdiction of said Referee and said court, and is contrary to the law and the evidence and to the findings of fact and conclusions of law herein.

Wherefore, said Ray Ingels, Director of the Motor Vehicle Department of the State of California, Howard E. Deems, Registrar of Motor Vehicles of the State of California, and the Motor Vehicle Department of the State of California, appellants herein, pray that said order dated October 22, 1937, confirming said order of said Referee dated June 14, 1937, be and that each of them be reversed, and that an order be made and entered reversing said order of the District Court and ordering said trustee to pay from the proceeds of any sale of said motor vehicles free and clear of any and all liens, not only the motor vehicle license fees as [fol. 108] provided by law, but in addition thereto the penalties thereon as provided by law, and for costs herein, and for such other and further order and relief as may be meet and proper in the premises.

Dated: November 20, 1937.

U. S. Webb, Attorney General, by John O. Palstine, Deputy Attorney General, Attorneys for Ray Ingels, Director of Motor Vehicles of the State of California, Howard E. Deems, Registrar of Motor Vehicles of the State of California, and the Motor Vehicle Department of the State of California, Appellants.

[Endorsed:] Received copy of the within Petition For Appeal and Order Allowing Appeal and Assignments of Error this 20th day of Nov. 1937. David Schwartz, Attorney for Trustee.

[File endorsement omitted.]

[fol. 109] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR  
THE NINTH CIRCUIT

No. 8711

In the Matter of RICHMAID CREAMERIES, INC., a Corporation,  
Debtor,

RAY INGELS, Director of Motor Vehicles of the State of California, HOWARD DEEMS, as Registrar of Motor Vehicles of the State of California, and the Motor Vehicle Department of the State of California, Appellants,

vs.

L. BOTELER, Trustee of Richmaid Creameries, Inc., a corporation, Debtor, Appellee

PETITION FOR APPEAL—Filed Nov. 22, 1937

To the Honorable Justices of the Above Entitled Court:

The Honorable Ernest R. Utley, Referee in Bankruptcy in the District Court of the United States, Southern District of California, Central Division, having, on June 14, 1937, made an order in the above bankruptcy proceeding, ordering Ray Ingels, Director of Motor Vehicles of the State of California, Howard E. Deems, Registrar of Motor Vehicles of said State, and the Motor Vehicle Department of said [fol. 110] State, to file in said bankruptcy proceeding their claim for registration and license fees owing upon motor vehicles operated by the trustee of the above named bankrupt estate, before thirty days from the date of said order, or be forever barred, and ordering any and all penalties assessed in connection with said license fees to be set aside, and setting said penalties aside, and ordering said trustee to sell said motor vehicles free and clear of any and all liens of said Department of Motor Vehicles or said officers,



and overruling the objection of said department and said officers to the summary jurisdiction of said referee; and

The Honorable George Cosgrave, Judge of said District Court, having on October 22, 1937, made an order denying the petition of said Department of Motor Vehicles and said officers for a review of said order of said referee, and said petitioners for review feeling themselves aggrieved by said order of said judge confirming said order of said referee,

Said Ray Ingels, Director of Motor Vehicles of the State of California, Howard E. Deems, as Registrar of Motor Vehicles of the State of California, and the Motor Vehicle Department of the State of California, Do Hereby Petition for the Allowance of an Appeal from said order of said District Court to the United States Circuit Court of Appeals [fol. 111] peals, for the Ninth Circuit, for the reasons and upon the grounds set forth in the assignment of errors filed herewith, and said petitioners pray that their appeal may be allowed and a citation issued directed to L. Boteler, trustee of Richmaid Creameries, Inc., a corporation, debtor, commanding him to appear before said United States Circuit Court of Appeals, for the Ninth Circuit, to do and receive what may be required in the interests of justice in the premises, and that a transcript of the record, exhibits, statement of evidence, stipulations, pleadings, and all proceedings herein, duly authenticated, may be transmitted to said United States Circuit Court of Appeals, for the Ninth Circuit, or for such other and further relief as may be meet and proper in the premises.

Your petitioners respectfully represent that the time within which this appeal is required to be taken has not permitted the petitioners to furnish this Court with a complete transcript on which to exercise its discretion in allowing said appeal; that attached hereto, however, marked Exhibit "A", and hereby made a part hereof as though set forth herein in full, is a copy of pertinent portions of the "Petition for Review of Order of Referee in Bankruptcy" as filed in the said District Court; that such petition fully sets forth the proceedings had and the orders made, the review of which the petitioners desire to have this Court make and for which said petitioners hereby petition this Court for the allowance of an appeal.

[fol. 112] Also attached hereto, marked Exhibit "B", and hereby made a part hereof as though set forth herein in full, is a copy of the order made by the referee, which

order the District Judge confirmed by his minute order which merely denied the Petition for Review of said referee's order.

Dated: November 20, 1937.

U. S. Webb, Attorney General, by John O. Palstine, Deputy Attorney General, Attorneys for Ray Ingels, Director of Motor Vehicles of the State of California, Howard E. Deems, Registrar of Motor Vehicles of the State of California, and the Motor Vehicle Department of the State of California, Appellants.

(Clerk's Note: The exhibits referred to are not printed following this petition as they already appear in the transcript in their proper place.)

[File endorsement omitted.]

[fol. 113] IN UNITED STATES CIRCUIT COURT OF APPEALS

ASSIGNMENTS OF ERROR—Filed Nov. 22, 1937

Come now Ray Ingels, Director of Motor Vehicles of the State of California, Howard E. Deems, Registrar of Motor Vehicles of the State of California, and the Motor Vehicle Department of said State of California, appellants herein, and respectfully urge that the District Court of the United States, Southern District of California, Central Division, erred in making its order of October 22, 1937, confirming, and denying the petition of said appellants for a review of that certain order of the Honorable Ernest R. Utley, Referee herein, dated June 14, 1937, and relating to the payment of license fees and penalties thereon for the operation of certain automotive equipment of the bankrupt upon the public highways of the State of California, and present, in connection with their petition for appeal from said order, the following assignments of error:

# I

That the finding of the referee that neither of the trustees herein had any funds with which to pay on or before February 4, 1937, the fees in question, which finding was not disapproved or modified by the District Court, is contrary to the law, the evidence and records on file herein.

## II

That the finding of the referee, which was not disapproved or modified by the District Court, that the trustee is entitled to a bar order requiring the appellant state officers to file a claim for said fees or be forever barred from asserting any claim or claims for taxes and/or registration and license fees against said motor vehicles, is contrary to the law, the evidence and the records on file herein.

[fol. 114]

## III

That the conclusion of law of said referee, which was not modified or rejected by said District Court, that the appellants herein had no claim against the estate herein, is contrary to the law and the findings of fact.

## IV

That the conclusion of law of the referee, which conclusion was not modified or rejected by said District Court, that said Department of Motor Vehicles had no valid lien upon the motor vehicles in question, is contrary to the law and the findings of fact.

## V

That the order of said referee, as confirmed by said District Court, setting aside any and all penalties assessed upon or claimed against said motor vehicles, is in excess of the jurisdiction of said referee, and said court, and is contrary to the law and the evidence and is not warranted or supported by the referee's own conclusions of law.

## VI

That the order of the referee, confirmed by said District Court, directing the trustee herein to sell said motor vehicles free and clear of any and all claims or liens of the appellants, is in excess of the jurisdiction of said referee and said court, and is contrary to the law and the evidence and to the findings of fact and conclusions of law herein.

## VII

That the order of the referee, as confirmed by the District Court herein, requiring said appellants to "file their claim or claims for the registration and license fees owing upon

said motor vehicles and against the above named bankrupt estate on or before thirty days" from the date of said order [fol. 115] or be forever barred from asserting said claim or claims either against said vehicles or against this bankrupt estate or against the trustee herein individually or as such trustee, is in excess of the jurisdiction of said referee and said court, and is contrary to the law and the evidence and to the findings of fact and conclusions of law herein.

Wherefore, said Ray Ingels, Director of the Motor Vehicle Department of the State of California, Howard E. Deems, Registrar of Motor Vehicles of the State of California, and the Motor Vehicle Department of the State of California, appellants herein, pray that said order dated October. 22, 1937, confirming said order of said referee dated June 14, 1937, be and that each of them be reversed, and that an order be made and entered reversing said order of the District Court and ordering said trustee to pay from the proceeds of any sale of said motor vehicles free and clear of any and all liens, not only the motor vehicle license fees as provided by law, but in addition thereto the penalties thereon as provided by law, and for costs herein, and for such other and further order and relief as may be meet and proper in the premises.

Dated: November 20, 1937.

U. S. Webb, Attorney General, by John O. Palstine,  
Deputy, Attorneys for Appellants.

[File endorsement omitted.]

[Endorsed:] Filed Nov. 23, 1937 at 5 o'clock p. m. R. S. Zimmerman, Clerk. By M. R. Winchell, Deputy.

[fol. 116] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER ALLOWING APPEAL—Nov. 22, 1937

Upon consideration of the petition of Ray Ingels, Director of Motor Vehicles of the State of California, et al., for allowance of appeal herein under section 24 (b) of the Bankruptcy Act, filed Nov. 22, 1937, and of the assignments of error thereon, filed therewith, and by direction of the court,

It is Ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the order of the District Court of the United States for the Southern District of California, Central Division, made on October 22, 1937, denying the petition for a review of the order of the referee herein, be, and hereby is allowed, conditioned upon the giving of a cost bond in the sum of Two Hundred and Fifty Dollars (\$250.00) with good and sufficient security, within ten days from date.

It is Further Ordered that if an appeal has been allowed in this cause by said District Court, and a cost bond given on such appeal, then no additional cost bond need be given on this appeal.

I Hereby Certify that the foregoing is a full, true and correct copy of an original Order made and entered in the within-entitled cause.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 22nd day of November, A. D. 1937.

Paul P. O'Brien, Clerk, U. S. Circuit Court of Appeals for the Ninth Circuit. (Seal.)

[Endorsed:] Filed Nov. 27, 1937 at 41 min. past 12 o'clock P. M. R. S. Zimmerman, Clerk. By F. Betz, Deputy Clerk.

[fols. 118-120] Bond on appeal for \$250.00 approved and filed Nov. 24, 1937, omitted in printing.

[fol. 121] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION IN LIEU OF PRAECIPE FOR TRANSCRIPT OF RECORD  
ON APPEAL—Filed January 19, 1938

To the Clerk of the above entitled district court:

We hereby respectfully request you to prepare and certify to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, the transcript of record on the appeal to said Circuit Court to reverse the decree and order



made by said District Court on October 22, 1937, denying the petition of Ray Ingels, Director of Motor Vehicles of the State of California and Howard E. Deems, Registrar of Motor Vehicles of said State to review, and confirming, the order of the Referee in Bankruptcy herein made and entered on June 14, 1937, said transcript to consist of the following papers and documents now on file in said District Court:

1. Petition for order setting aside penalties against bankrupt.

2. Order to Show Cause, dated March 6, 1937, issued on said Petition.

[fol. 122]. 3. Amended Petition for order setting aside penalties against bankrupt.

4. Amended Order to Show Cause dated April 8, 1937.

5. Opinion of Referee, dated May 25, 1937.

6. Findings of Fact and Conclusions of Law.

7. Petition for review of order of Referee in Bankruptcy.

8. Referee's Certificate on Petition for Review.

9. Referee's Supplemental Certificate on Petition for review.

10. Minute order, dated October 22, 1937, of above District Court, confirming, and denying petition for review of, said referee's order of June 14, 1937.

11. Petition for appeal and order allowing same, and assignments of error, filed in the United States District Court.

12. Citation issued by said District Court.

13. Copies of petition for appeal, assignments of error, and order allowing appeal, filed in the United States Circuit Court of Appeals for the Ninth Circuit.

14. Citation issued by said Circuit Court.

15. Cost Bond on Appeal.

16. Statement of Evidence.

17. This Praecipe.

It is hereby stipulated that the foregoing shall constitute the transcript of record herein on this appeal. It is further stipulated that in lieu of copying the names and titles of the court, the title and number to the cause, the same may, in said transcript of record on this appeal, be abbreviated as follows: (Title of court and cause)

Dated: January 18, 1938.

DAVID SCHWARTZ,

—Attorney for Appellee,  
Trustee in Bankruptcy.

U. S. WEBB,

Attorney General

By JOHN O. PALSTINE,

Deputy Attorney General

Attorneys for Appellants

[Endorsed]. Filed R. S. Zimmerman, Clerk at 56 min. past 1 o'clock Jan. 19, 1938 P. M. By M. R. Winchell, Deputy Clerk.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 123 pages, numbered from 1 to 123 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellants, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citations; petition for order setting aside penalties against Bankrupt; order to show cause; amended petition for order setting aside penalties against Bankrupt; amended order to show cause; opinion of Referee, and findings of fact and conclusions of law, and order; petition for review of order of Referee; Referee's certificate on petition for review; Referee's supplemental certificate on petition for review; order of October 22, 1937; statement of evidence; petition for appeal, order allowing appeal and assignment of errors in the United States District Court; petition for appeal, assignment of errors and order allowing appeal in the United States Circuit Court; bond on appeal, and stipulation in lieu of praecipe.

I do further certify that the amount paid for printing the foregoing record on appeal is \$153.20 and that said amount has been paid the printer by the appellants herein and a receipted bill is here-

with enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to \$19.10 and that said amount has been paid me by the appellants herein.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this 2nd day of February, in the year of Our Lord One Thousand Nine Hundred and Thirty-eight and of our Independence the One Hundred and Sixty-second.

[Seal]

R. S. ZIMMERMAN,  
Clerk of the District Court of the  
United States of America, in  
and for the Southern District  
of California.

By EDMUND L. SMITH,

Deputy.

[Endorsed]: Printed Transcript of Record. Filed  
February 3, 1938. Paul P. O'Brien, Clerk.





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No. 8711

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IN THE

**United States Circuit Court of Appeals****For the Ninth Circuit**

In the Matter of

**RICHMAID CREAMERIES, INC.,**  
a corporation,

Debtor.

**RAY INGELS, Director of Motor Vehicles of the  
State of California, HOWARD E. DEEMS, as  
Registrar of Motor Vehicles of the State of  
California, and the MOTOR VEHICLE DE-  
PARTMENT OF THE STATE OF CALI-  
FORNIA,**

Appellants,

vs.

**L. BOTELER, Trustee of the Estate of RICH-  
MAID CREAMERIES, INC., a corporation,**  
Debtor,

Appellee.

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**Upon Appeal from the District Court of the United  
States for the Southern District of California,  
Central Division.**

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**PROCEEDINGS HAD IN THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT.**



**United States Circuit Court of Appeals  
for the Ninth Circuit**

**Excerpt from Proceedings of Wednesday, June  
22, 1938.**

**Before: Garrecht, Stephens and Healy,  
Circuit Judges.**

**[Title of Cause.]**

**ORDER OF SUBMISSION**

Ordered appeal in each of above causes argued by Mr. John O. Palstine, Deputy Attorney General, State of California, counsel for appellants, and by Mr. David Schwartz, counsel for appellee, and submitted to the court for consideration and decision.

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**United States Circuit Court of Appeals  
for the Ninth Circuit**

**Excerpt from Proceedings of Thursday, December 15, 1938.**

**Before: Garrecht, Haney and Stephens,  
Circuit Judges.**

**[Title of Cause.]**

**ORDER DIRECTING FILING OF OPINION  
AND FILING AND RECORDING OF DE-  
CREES.**

**By direction of the Court, ordered that the type-  
written opinion this day rendered by this court, in**

above causes be forthwith filed by the clerk, and that a decree be filed in each of said causes and recorded in the minutes of this court in accordance with the opinion rendered.

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In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 8711

**RAY INGELS**, Director of Motor Vehicles of the  
State of California, **HOWARD E. DEEMS**,  
as Registrar of Motor Vehicles of the State of  
California, and the **MOTOR VEHICLE DE-  
PARTMENT OF THE STATE OF CALI-  
FORNIA**,

Appellants,

vs.

**L. BOTELER**, Trustee of the Estate of **RICH-  
MAID CREAMERIES, INC.**, a corporation,  
Debtor,

Appellee.

No. 8761

Dec. 15, 1938

RAY. INGELS, Director of Motor Vehicles of the  
State of California, and HOWARD E. DEEMS,  
as Registrar of Motor Vehicles of the State of  
California,

Appellants,

vs.

L. BOTELER, Trustee of RICHMAID CREAM-  
ERIES, INC., a corporation,

Appellee.

Upon Appeals from the District Court of the United  
States for the Southern District of California,  
Central Division.

## OPINION

Before: Garrecht, Stephens and Healy,  
Circuit Judges.

Garrecht, Circuit Judge.

The Richmaid Creameries, Inc., filed its petition under Section 77b of the Bankruptcy Act 11 U. S. C. A., Sec. 207) in the court below on September 16, 1936, and on the same day John H. Chamness was appointed temporary trustee, with authority to operate the business of the debtor. Prior to September 16, 1936, The Richmaid Creameries, Inc., was engaged in the creamery business in Wilmington,



California, owning certain milk and ice cream routes and making deliveries thereon and operating twenty-seven automobiles and trucks in the course of such business.

The temporary trustee began to operate the business and borrowed money for that purpose, but his first month of operation of the business resulted in a loss of \$2,865.00. On December 22, 1936, the District Court entered an order directing liquidation of the assets of the debtor, continuing the trustee in office for that purpose, and referred the estate generally to the referee for further administration.

January 5, 1937, a schedule of assets and liabilities of Richmaid was filed, showing assets of \$148,380.02, and liabilities of \$87,089.64, including \$2,000.00 borrowed by the trustee on certificates.

January 20, 1937, L. Boteler, appellee here, was appointed trustee in bankruptcy for the purpose of liquidating the assets of Richmaid.

During the months of January and February, 1937, and up to and including February 27, 1937, the temporary trustee and the trustee, respectively, continued to operate the business of Richmaid and to make the usual deliveries of milk and ice cream on the aforesaid "routes." The trustee issued checks against the estate in payment of expenses in connection with the operation of the business. When there were insufficient funds in the estate to pay the checks, the trustee, on some occasions cashed the same out of his own personal funds and held the checks until there were sufficient funds in the bankrupt estate with which to pay the same.

The total receipts of the trustee from September 16, 1936, to January 19, 1937, were \$70,006.23, and the total disbursements for the same period were \$79,647.65; the total receipts from January 20, 1937, the date when the appellee assumed trusteeship of the estate of Richmaid, to February 4, 1937, were \$7,899.61, while the total disbursements for the same period were \$7,624.46.

Automobile license fees are due and payable in the state of California on the first day of January of each year, to be paid at the time of registration or renewal thereof. (Sec. 3, Calif. Vehicle License Fee Act (Ch. 362, Cal. Stats. 1935, as amended).) Delinquency arises upon operation of a vehicle upon any highway of the State without the license fee having been paid and a penalty attaches if the fee is not paid within 30 days. (Sec. 6, *ibid.*) The penalty is by law added to the fee upon any application for annual renewal of registration made on or after February 5, unless the vehicle has not been operated on the highways of the state since the expiration date. (Sec. 378 (b) Calif. Vehicle Code.) Section 379(a) of the California Vehicle Code provides that every registration or transfer fee and any penalty added thereto from the time the same became due, constitute a lien upon the vehicle for which due.

Continuously during the month of January, 1937, and to and including February 27, 1937, the temporary trustee and the trustee operated the Richmaid

automobiles and trucks upon the public highways of the state of California, carrying on the business of Richmaid.

The trustee did not pay the California 1937 license fees upon said vehicles, in the amount of \$410.90, prior to February 5, 1937. On February 28, 1937, the referee made an order confirming the sale of Richmaid's milk and ice cream delivery routes and certain equipment, for the sum of \$8260.00. This was the first property sold in liquidation, and the trustee did not thereafter attempt to operate the business of the debtor.

On or about February 27, 1937, 23 days after the statutory delinquency date, the trustee made application to the Department of Motor Vehicles of the State of California for 1937 licenses for the motor vehicles referred to, tendering the fees, but not the penalties demanded by the statutes of California for violation of its motor vehicle license laws. Because of the refusal of the trustee to pay the penalties required by the laws of the state of California, the 1937 licenses were not issued to him.

Thereafter, the trustee filed a petition with the referee for an order requiring the appellants here to show cause why the penalties assessed against the Richmaid motor vehicles should not be set aside and, further, to show cause why the 1937 license plates for said motor vehicles should not be issued to the trustee upon payment of the fees, exclusive of the penalties. Following this, the trustee filed an

amended petition to require the appellants to show cause why they should not be required immediately to file such claims as they assert against the bankrupt estate or be forever barred from asserting such claims against said estate or against the motor vehicles, and further requiring said appellants to show why the trustee should not be authorized to sell the motor vehicles free and clear from any and all liens claimed by the motor vehicle department of the state of California upon said vehicles.

The referee made certain findings of fact, most of which are set forth above, but, in addition, the referee made findings as follows:

"The court further finds that the trustee herein had absolutely no funds in his possession between the date of his appointment on the 20th day of January, 1937 and the 27th day of February, 1937 with which to purchase the 1937 license plates for said motor vehicles \* \* \*."

"The court further finds that at no time prior to the 27th day of February, 1937, did said trustee have funds with which to pay said registration and license fees owing upon said motor vehicles and that the same condition existed from the date that the order of liquidation was made herein, to-wit, the 22nd day of December, 1936 to the date of the appointment of L. Boteler, the present trustee on the 20th day of January, 1937. That during the month of January, 1937 and up to the said 27th day of February, 1937,

the trustee herein and his predecessor operated said vehicles upon the public highways of the State of California without the payment of any registration and license fees for said year."

The referee made an order setting aside all penalties assessed against the motor vehicles and directed the trustee to sell said motor vehicles free and clear of any and all liens thereon arising by reason of the failure of the trustee to pay the motor vehicle license tax provided under the laws of the state of California and commanding Ingels and Deems to file claims in the bankruptcy proceeding for the registration and license fees upon said motor vehicles within 30 days from the date of the order "or be forever barred from asserting any claim or claims for taxes and/or registration or license fees against said motor vehicles and against this bankrupt estate or the trustee herein, either in his official capacity as such trustee or individually." The appellants petitioned the District Court to review the said order and the District Judge denied the petition and confirmed the order of the referee.

In addition, the trustee had petitioned the referee for an order directing the appellants to receive the principal of the license fees in full payment of any and all sums owing by Richmaid on said motor vehicles and enjoining collection or attempted collection by them of any penalties which the statutes of the state of California compelled them to collect.



The referee declined to include such mandate in his order, and the trustee made application to the District Court, for a mandatory injunction directed to the appellants requiring them to receive the statutory fees less the penalties and to deliver the license plates to the trustee, which issued the order as prayed.

An appeal was allowed Ingels, Director of Motor Vehicles of the State of California, and Deems, as Registrar of Motor Vehicles, from each order.

The sole question in each case is whether the lower court committed error in entering the order appealed from.

The two cases involved the identical facts, were consolidated for briefing and hearing and are disposed of in this opinion.

The referee made two findings of fact, set forth above, to the effect that the trustee had no funds with which to pay the license and registration fees prior to February 5, 1937. These findings are contrary to the true facts. Actually during the period January 20, 1937, to February 4, 1937, large sums of money were received by the trustee, all of which were received and paid out *before* the license became subject to penalty, without taking into account the moneys received and disbursed in the operation of the business from January 1, to January 19, 1937.

Whether a debt or claim is provable in bankruptcy turns upon its status at the time of the filing of the petition (Sec. 760, Remington on Bank-

ruptcy, 4th ed.); claims not owing at the time of filing of the petition are not provable (Sec. 807, Remington; Colman Co. v. Withoft (C. C. A. 9), 195 F. 250, 252; Cantor v. Cherry (C. C. A. 3), 73 F.(2d) 188). Section 1 (9) of the Bankruptcy Act (11 U. S. C. A., Sec. 1) includes, in the definition of "creditor" anyone who owns a demand or claim provable in bankruptcy. While actually neither demand nor claim, taxes are "provable" in their nature (Sec. 845, Remington).

If the taxes in question were due and payable at the time of the filing of the petition, they would be provable, and, it follows, under Section 57 (j) of the Act (11 U. S. C. A., Sec. 93 (j)), penalties thereon would not be allowable, save to the extent permitted by said section.

But here we are confronted with a different set of facts. These taxes became fixed by reason of the operation of the business by the trustees, after the date of the filing of the petition and after the date of what in effect amounted to an adjudication. It should be obvious that a debt or claim created thereby was not provable, not being in existence at the time of the filing of the petition and, therefore, not dischargeable.

The right of the trustee, under order of the court, to operate the business for a limited period cannot be challenged, but the estate, save as to existing lienholders not consenting—of which there are apparently none here, is liable for the charges incurred, even to the extent of the depletion of the

assets of the estate, even to the detriment of labor claimants. The reason is simple: The operation of the business in such situation is for the benefit of the creditors. Remington, Sec. 2662, 445, 446.

The motor vehicle license or registration fee is a privilege tax levied in exercise of the police power to control and regulate travel on the public highways. It is not considered as a tax on the motor vehicle itself, but for the privilege of using the highways. Blashfield, Cyc. of Automobile Law, Sec. 212, Vol. 1, p. 158. A license to operate a motor vehicle is granted under the inherent right of the state or municipality to regulate its use on the public highways or streets. Ibid., Sec. 211, p. 157. The only automobiles required to be registered under the California Motor Vehicle Act are vehicles to be used upon the public highway (Cal. Stats. 1927, p. 1424; California Standard Finance Corp. v. Riverside Finance Co., 111 Cal. App. 151, 163, 295 P. 555); if the vehicles were not used, no registration fee would have fallen due under the law of California. But, in carrying on the business of Richmaid, the motor vehicles were operated upon the public highways of the state of California and thereby the registration and license fees attached. They were not paid, but became delinquent, and on February 5, 1937, the penalties prescribed by law applied. California Vehicle Code, Sec. 370, et seq.; California Vehicle License Fee Act, Sec. 6.

The motor vehicles in question could not be operated in 1937 without incurring the license and regis-

tration fees. Necessarily, therefore, the fees were an expense of doing business and were chargeable against the estate. The trustee has the duty of seeking out and paying all taxes (Sec. 847, Remington). He knew, or should have known, that a license fee was required before the motor vehicles could be legally operated upon the public highways, although, if the motor vehicles had not been used the fees would not have become payable.

Were the motor vehicles operated by Richmaid itself, or any other person or corporation, there would be no question of liability for the penalties. Is a trustee operating a business absolved from compliance with law?

The trustee cites Section 57 (j) of the Bankruptcy Act (11 U. S. C. A., Sec. 93 (j)) as authority for holding the penalty inapplicable. That section provides that "Debts owing to . . . a State . . . as a penalty or forfeiture shall not be allowed, except . . ." for pecuniary loss, costs and interest. We have already pointed out that the tax in question could not be a provable dischargeable claim. Obviously, the section refers to debts owing by the bankrupt and not by the trustee.

The normal course of procedure in bankruptcy is liquidation, not continuance of the business of the bankrupt. Where the business of the bankrupt is conducted for a limited period by the trustee, upon order of the court, the purpose is to benefit the creditors. The expenses of operation must be paid out of the estate. That the license and registration

fees are legitimate expenses, there can be no question.

By the Act of June 18, 1934, (48 Stat. 993, 28 U. S. C. A., Sec. 124 (a)), a trustee who is authorized by any United States Court to conduct any business, and does so, is subject to all State and local taxes "applicable to such business the same as if such business were conducted by an individual or corporation." This is sufficient basis for the attachment of the penalty and lien.

While the property which was in possession of the bankrupt at the time of filing of the petition, or to which it was entitled, is regarded as in custodia legis, we have been cited to no authority which would prevent a lien granted by State law from attaching by reason of the operation of a business of a bankrupt by a trustee and a violation of the State law by that trustee. The general rule is that the law of the state will control as to the nature of a lien, its creation, the time of taking effect. Sec. 1891, Remington. Under Section 124 (a) of 28 U. S. C. A., it follows that the lien in this case is valid.

The Supreme Court, in the case of Swarts v. Hammer, 194 U. S. 441, 444, said: "By the transfer to the trustee no mysterious or peculiar ownership or qualities are given to the property. It is dedicated, it is true, to the payment of the creditors of the bankrupt, but there is nothing in that to withdraw it from the necessary protection by the State and municipality, or which should exempt it from its obligations to either."



In *State of California v. Hisey*, 84 F.(2d) 802, 805, a receivership case, we held that the appointment of a receiver by a court of equity could not have any effect upon the right of the State of California to collect penalties for unpaid taxes that receivers had been compelled in numerous cases to pay penalties for non-payment of taxes which accrued subsequent to their appointment. We further held that "If the penalty, as well as the tax, is a lien upon the property in the hands of a receiver, as the statutes of California provide, it is difficult to see how the payment of the penalty can be differentiated from the payment of the lien for the tax.

\* \* \* The penalty is a part of the tax. \* \* \*

Compare *Michigan v. Michigan Trust Co.*, 286 U. S. 334, 344; *People v. Hopkins* (C. C. A. 2), 18 F.(2d) 731, 733; *McFarland v. Hurley* (C. C. A. 5), 286 F. 365, 366; *Coy v. Title Guarantee & Trust Co.* (C. C. A. 9), 220 F. 90, 92.

This view is upheld by the United States Circuit Court of Appeals for the Second Circuit. In the case of *In re Humeston*, 83 F.(2d) 187, 189, that court said.

"\* \* \* Such taxes as fell due during the period of the trustee's occupation were part of the expenses of that occupation and should be borne by the estate. \* \* \* When \* \* \* the mortgagor's trustee continues the occupation, he necessarily means to exploit it for profit, and the gross returns must pay the running expenses. Thus taxes which became payable be-

tween November 1, 1933, and May 21, 1935, must be paid, and not only the entire face of these, but all interest and *penalties* accumulated upon them. It was the trustee's duty to pay them when they fell due and the estate must suffer from his failure. \* \* \* [Emphasis is by the Court.]

Additional authority may be found In re Preble Corporation (D. C. Me.) 15 F. Supp. 775, 776 (Aff. on different grounds 84 F.(2d) 73; cert. den. 299 U. S. 575):

"Generally speaking, property in the custody and control of federal receivers and trustees is subject to taxation under state law the same as any other property. \* \* \* [Cases cited.]

"A proper performance of the duty to protect the property intrusted to its agents by the court requires the payment of taxes. In this case taxes are a part of the necessary expense of carrying on the business.

"The trustee is subject to all state and local taxes which are applicable to the business which he conducts."

"If the trustee fails to pay taxes in a proper case, although he has sufficient funds to do so, and thereby subjects the estate to interest and penalties, he will be surcharged to the extent of such interest and penalties." Gerdes on Corporate Reorganizations, vol. 1, §400."

Insofar as the decision In re Messenger's Merchants Lunch Rooms, Inc., (C. C. A. 7), 85 F.(2d) 1002, cited by the appellee as authority for affirmance, is in conflict herewith, it is expressly disapproved.

The order of the District Court is reversed in each case, with directions to order the registration and license fees and accrued penalties paid, or, in the alternative, to permit the motor vehicles to be disposed of subject to the lien of the State of California for the unpaid taxes and penalties.

The orders of the court below are reversed.

[Endorsed]: Opinion. Filed Dec. 15, 1938. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals  
for the Ninth Circuit

No. 8711

RAY INGELS, Director of Motor Vehicles of the  
State of California, et al.,

Appellants,

vs.

L. BOTELE, Trustee of the Estate of RICHMAID  
CREAMERIES, INC., a corporation, Debtor,  
Appellee.

DECREE

Appeal from the District Court of the United  
States for the Southern District of California, Cen-  
tral Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Southern District of California, Central Division, and was duly submitted:

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the order of the said District Court in this cause be, and hereby is, reversed with directions to order the registration and license fees and accrued penalties paid, or, in the alternative, to permit the motor vehicles to be disposed of subject to the lien of the state of California for the unpaid taxes and penalties, with costs in this court in favor of appellants and against appellee.

It is further ordered, adjudged, and decreed by this Court, that the appellants recover against the appellee for their costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered Dec. 15, 1938.  
Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

**CERTIFICATE OF CLERK, U. S. CIRCUIT  
COURT OF APPEALS FOR THE NINTH  
CIRCUIT, TO RECORD CERTIFIED UN-  
DER RULE 38 OF THE REVISED RULES  
OF THE SUPREME COURT OF THE  
UNITED STATES.**

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred forty-five (145) pages, numbered from and including 1 to and including 145, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellee, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 2nd day of March, A. D. 1939.

[Seal]

PAUL P. O'BRIEN,

Clerk.



[fol. 147] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 24, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(3597)



# CLERK'S COPY.

## TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1939

No. 16

---

L. BOTELER, TRUSTEE OF RICHMAID CREAM-  
ERIES, INC., DEBTOR, PETITIONER,

*vs.*

RAY INGELS, DIRECTOR OF MOTOR VEHICLES  
OF THE STATE OF CALIFORNIA, ET AL.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE NINTH CIRCUIT.

---

PETITION FOR CERTIORARI FILED MARCH 14, 1939.

CERTIORARI GRANTED APRIL 24, 1939.



# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

## No. 16

L. BOTELER, TRUSTEE OF RICHMAID CREAM-  
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*vs.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
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[fol. 1] Names and Addresses of Attorneys omitted in printing.

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[fol. 4]

**IN UNITED STATES DISTRICT COURT, SOUTHERN  
DISTRICT OF CALIFORNIA, CENTRAL DIVISION**

No. 28563-C

IN THE MATTER OF RICHMAID CREAMERIES, INC., a corporation,  
Debtor

**Agreed Statement of Case—Filed February 10, 1938**

In order to shorten the record on appeal for the assistance of the court, it is stipulated and agreed by and between L. Boteler, Trustee in Bankruptcy of Richmaid Creameries, Inc., a corporation, and Ray Ingels as Director of Motor Vehicles of the State of California, and Howard E. Deems as Registrar of Motor Vehicles of the State of California, through their respective attorneys of record, that, subject to the approval of the court, the following constitutes an agreed statement of the above entitled matter as between said parties, and a statement of all of the evidence taken and proceedings had herein relating to that certain order by the District Court herein, dated January 3, 1938, ordering and enjoining said Ray Ingels and said Howard E. Deems and each of them, their agents, servants and employees, to issue to said L. Boteler the certificates of ownership, registration cards and California License plates upon certain motor vehicles, without the payment of the penalty and/or penalties provided by the Vehicle Code of the State of California as amended, and the Vehicle License Fee Act of the State of California as amended, said agreed statement to be used on the appeal of said Ray Ingels and said [fol. 5] Howard E. Deems to the United States Circuit Court of Appeals for the Ninth Circuit from said order:

1

Prior to September 16, 1936, the above named debtor was engaged in the creamery business in the State of California. Amongst the assets of said debtor were certain milk and

ice cream routes, and twenty seven automobiles and trucks used in the business of said debtor, and particularly in connection with the making of deliveries upon said milk and ice cream routes.

## II

On September 16, 1936, the petition of the above named debtor was filed in the above entitled District Court, pursuant to the provisions of Section 77b of the Bankruptcy Act. On the same date, said petition was approved and John H. Chamness was appointed temporary trustee, with authority to operate the business of said debtor.

On September 23, 1936, pursuant to petition therefor duly filed by said temporary trustee, said District Court made its Order granting said temporary trustee permission to issue Trustee's Certificates to the amount of \$10,000 to raise funds for the use of said temporary trustee in the continuance and operation of the business of said debtor.

On October 16, 1936, said temporary trustee filed a report with said District Court of his operations of said business during the first month of his trusteeship. Said report shows that said trustee had borrowed \$2,000.00 on the afore-said certificates and that during said month his operation of said business had resulted in a loss of \$2865.00.

[fol. 6] On December 22, 1936, pursuant to petition theretofore filed and an order to show cause duly and regularly issued thereon, said District Court made its order directing the liquidation of the assets of the above named debtor, and appointed said John H. Chamness as temporary trustee for the purpose of such liquidation but with the same powers as previously given said trustee with regard to the operation of the business of said debtor, and further ordered that the administration of said estate generally be and the same was thereby referred to Ernest R. Utley, Referee in Bankruptcy, for further administration pursuant to the provisions of Section 77b of the Bankruptcy Act, as amended, and particularly with respect to subdivisions (c), (f) and (k) of said section.

On January 5, 1937, the schedule of assets and liabilities of said company was filed herein, showing assets of \$148,380.82 and liabilities of \$87,089.64, including said \$2,000.00 of Trustee's Certificates issued as hereinabove set forth.

On January 20, 1937, pursuant to notice duly and regularly given to the creditors of the above named debtor,

L. Boteler was appointed as liquidating trustee in Bankruptcy and immediately thereafter duly qualified and took possession of the assets of the debtor. Continuously since said time said L. Boteler has been and now is the duly qualified and acting trustee of said estate.

### III

Continuously during the month of January, 1937, and to and including February 27, 1937, said temporary trustee and said trustee, respectively, in order to preserve the full value of the business of the debtor as a going concern pending liquidation, continued to operate the business of said debtor and to make the usual deliveries of milk and ice cream upon the aforesaid milk and ice cream routes of said debtor, and, in that connection, operated the aforesaid automobiles and trucks upon the public highways of the State of California. There thereby became due to the State of California as and for license and registration fees upon said vehicles for the year 1937, fees in the amount of \$410.90. Said fees were due and payable on or before February 4, 1937.

### IV

During the operation of the business of the debtor by the trustee, as aforesaid, he issued checks against the estate herein, for the purchase of milk and for the payment of labor and other expenses in connection with the operation of said milk and ice cream routes to the extent of the funds in his hands. When there were insufficient funds in said estate to pay said checks, said trustee, on some occasions, cashed the same out of his own personal funds and held the checks until there were sufficient funds in the bankruptcy estate with which to pay the same. He did not pay to the State of California the 1937 license fees upon said vehicles, in the amount of \$410.90 prior to February 4, 1937.

### V

On February 28, 1937, said referee herein made an order confirming the sale of the aforesaid milk and ice cream routes, together with milk bottles, milk cases, ice cream cabinets, compressors and other equipment for the sum of \$8260.00. This was the first property sold in said liquidation, and the trustee did not thereafter attempt to operate the business of the debtor.

## VI

[fol. 8] On or about February 27, 1937, said trustee applied to the Department of Motor Vehicles of the State of California for the 1937 licenses upon the motor vehicles hereinabove referred to. Said Department of Motor Vehicles demanded the payment of both said fees and said penalties as a condition to the issuance of said 1937 licenses and the transfers requested by said trustee. Said trustee offered to pay said fees but refused to pay any of said penalties added thereto. The licenses and transfers were therefore denied said trustee.

## VII

On March 6, 1937, said trustee filed with said Referee a petition seeking an order to show cause against Ray Ingels as Director of the Department of Motor Vehicles of the State of California and Howard E. Deems, Registrar of Motor Vehicles of the State of California, and each of them, "to show cause why the penalties assessed against said motor vehicles should not be set aside and why the 1937 license plates upon said motor vehicles should not be issued and delivered to said trustee upon the payment of the fees prescribed by law exclusive of said penalties." Certain proceedings were had and evidence offered and received and the Referee made his findings of fact, conclusions of law and order in regard to said order to show cause, all as set forth in the Transcript of Record on appeal No. 8711 now pending before the United States Circuit Court of Appeals for the Ninth Circuit, which transcript is hereby referred to and incorporated herein as a part of this agreed statement. In said order the Referee granted the trustee certain relief, but said referee declined to make any order [fol. 9] directing said Department or said officers to receive the principal of said fees in full payment of all sums owing said Department on said vehicles, and declined to enjoin said Department or said officers from demanding the penalties prescribed by law as a condition to the registration or transfer of said vehicles in the State of California in 1937, but ordered, adjudged and decreed that said order be without prejudice to the right of the trustee to apply to the federal court for any injunctive relief which said trustee might deem appropriate under the provisions of the Bankruptcy Act and subdivision 3 of General Order XII.



## VIII

Thereafter, on or about June 26, 1937, said L. Boteler, trustee, filed with said District Court a petition for mandatory injunction as follows:

### PETITION

To the Honorable George Cosgrave, judge of the United States District Court, Southern District of California, Central Division:

Your petitioner respectfully applies for mandatory injunction and by this, his certified petition, and in his behalf, sets forth the following facts and cases for the issuance of such mandatory injunction, namely:

#### I

That at all times mentioned herein, Richmaid Creameries, Inc., was a corporation duly organized and existing under and by virtue of the laws of the State of California and having its principal place of business in Wilmington, California.

[fol. 10]

#### II

That on or about the 16th day of September, 1936, said Richmaid Creameries, Inc., debtor herein, filed a petition under the provisions of Section 77b of the National Bankruptcy Act, as amended, in the above entitled court; that on the said day, pursuant to said petition, the court appointed one, John H. Chamness, temporary trustee with authority to operate the business of the debtor and that the said John H. Chamness, as such temporary trustee, operated said business at a loss and that on the 10th day of December, 1936, a petition was filed herein seeking an order to require the temporary trustee to liquidate the estate of said debtor and that pursuant to said petition, this court, on the 22nd day of December, 1936, entered its order for the liquidation of the assets of said debtor and referred the case to the Honorable Ernest R. Utley, as referee, for further administration pursuant to the provisions of Section 77b of the National Bankruptcy Act.

#### III

That on or about the 21st day of January, 1937, the petitioner herein was duly appointed Trustee in Bankruptcy

in said proceeding and immediately thereafter duly qualified and took possession of the assets of the debtor, including twenty-seven (27) trucks and automobiles hereinafter described.

#### IV

Your petitioner further alleges that the temporary trustee herein, ever since his appointment on the said 16th day of September, 1936, had no funds in his possession between the time of his appointment and the said 22nd day of December, 1936, with which to purchase the 1937 license plates [fol. 11] for said motor vehicles and further alleges that your petitioner, as such Trustee, had no funds between the date of his appointment on the said 21st day of January, 1937 and the 27th day of February, 1937, with which to purchase said license plates for said motor vehicles.

#### V

That at all times mentioned herein, Ray Ingels was and still is the Director of the Department of Motor Vehicles of the State of California, and Howard E. Deems was and still is the Registrar of Motor Vehicles of the State of California.

#### VI

That immediately after the consummation of a sale of some of the assets of said debtor, and, as soon as your petitioner had funds in his possession available for said purpose, your petitioner, on or about the 1st day of March, 1937, tendered and offered to pay to the Department of Motor Vehicles of and for the State of California, the proper registration fees and vehicle license fees for the year 1937 upon all of the motor vehicles hereinafter described and that the said Ray Ingels, as such Director of Motor Vehicles and the said Howard E. Deems, as such Registrar of Motor Vehicles, and each of them, have refused and still refuse to issue the 1937 license plates upon said motor vehicles to your petitioner as Trustee in Bankruptcy unless your petitioner pays in addition to the usual and proper fees hereinbefore mentioned and tendered, the penalties assessed against such motor vehicles, which penalties consist of one hundred per cent. of the registration fee and fifty per cent. of the vehicle license fee and which penalties are hereinafter enumerated, to wit, as follows:

Description of Vehicle	Engine Number	1936 License
Ford V-8	18-800655	2x7140
Ford-4	AA12550	K-6764
Ford V-8	1245685	K-6773
Ford V-8	18-725243	K-6770
Ford-4	AA4078994	K-6771
Ford-4	AA1958177	K-6772
Ford-4	AAB5057502	K-6767
Ford-4	AA3303515	K-6769
Ford V-8	1697695	K-7838
Ford-4	LB10372	K-6768
Ford-4	A287871	2Y8393
Chevrolet-6	T4648696	K-6766
Ford-4	AA4778199	K-6765
Homemade	DMV844687	76028
Ford V-8	18-1984288	1Y9493
Ford V-8	18-2003574	2Y8394
Dodge-6	T12-9416	7Y537
Ford V-8	1655069	2Y8396
Ford V-8	1294772	PCO4133
Chevrolet-6	K4831949	PCK6399
Dodge-4	A525823	2Y7141
Ford-4	AA3827503	K6925
Ford V-8	18-1294156	6Y6552
Ford V-8	18-1640707	2Y8395
International-6	HO33321	K2192
Terraplane-6	65611	2X7142

[fol. 13]

## VII

That the said Ray Ingels as such Director and the said Howard E. Deems as such Registrar of Motor Vehicles have demanded of and from the bankruptcy estate herein all of the aforesaid penalties in addition to the proper 1937 tax herein and that the said penalties herein assessed are not proper claims against the said bankrupt estate by reason of Section 57j of the Bankruptcy Act.

## VIII

That prior to the said 1st day of March, 1937, your petitioner had no funds available for the purpose of paying such registration and license fees and that your petitioner as such Trustee in Bankruptcy has undertaken and agreed to sell a number of said motor vehicles and that he has been unable to sell and dispose of the same by reason of the aforesaid penalties and by reason of the refusal of the said Ray Ingels, Director of Motor Vehicles and Howard E. Deems, Registrar of Motor Vehicles to issue said license.

plates upon the payment of the fees herein mentioned without such penalties and that your petitioner is unable to properly liquidate the assets of said bankrupt until the license plates upon said motor vehicles are duly issued and that great and irreparable injury and damage will be caused to the bankruptcy estate herein unless the license plates, certificates of ownership and registration cards are forthwith issued to your petitioner upon said motor vehicles.

[fol. 14]

IX

That your petitioner has heretofore, sold, pursuant to the order of this court, a number of the motor vehicles aforesaid and that he cannot deliver clear title to said motor vehicles for the reasons heretofore alleged; that as to the motor vehicles still unsold, your petitioner herein is unable to sell the same unless the license plates, certificates of ownership and registration cards are issued to your petitioner; that the Motor Vehicle Department of the State of California claims a lien upon all of said motor vehicles hereinbefore described and threatens to enforce said liens and take possession thereof and sell the same to satisfy said liens pursuant to Section 379 of the Vehicle Code of the State of California.

Wherefore your petitioner prays that a mandatory injunction issue out of and under the seal of this Honorable Court directed to the respondents above named, to wit, Ray Ingels, Director of Motor Vehicles of the State of California and Howard E. Deems, Registrar of Motor Vehicles of the State of California, and each of them, to issue the 1937 license plates, certificates of ownership and registration cards upon the motor vehicles described herein upon the tender and payment to the Motor Vehicle Department of the usual registration fees and license fees without the penalties provided by the Vehicle Code of the State of California or to show cause before this court at a specified time and place why they have not done so, and for such other and further relief as petitioner may be entitled to,

L. Boteler.

[fol. 15] STATE OF CALIFORNIA;  
County of Los Angeles, ss:

L. Boteler, being first duly sworn, deposes and says: That he is the petitioner in the above petition for manda-

tory injunction; that he has read the foregoing petition and knows the contents thereof, and the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

L. Boteler.

Subscribed and sworn to before me this 24th day of June, 1937. David Schwartz, Notary Public in and for said County and State.

## IX

Pursuant to said petition, said District Court issued its order as follows:

### ORDER

To The Motor Vehicle Department of the State of California, Ray Ingels, Director of Motor Vehicles of the State of California and Howard E. Deems, Registrar of Motor Vehicles of the State of California:

Whereas, it appears to this Court by the verified petition of L. Boteler, Trustee in Bankruptcy of Richmaid Creameries, Inc., a bankrupt, the party beneficially interested herein, that you, Ray Ingels, as Director of Motor Vehicles of the State of California and you, Howard E. Deems, as [fol. 16] Registrar of Motor Vehicles of the State of California, and the Motor Vehicle Department of the State of California, and each of you, refuse to issue the 1937 license plates, certificates of ownership and registration cards upon the motor vehicles described in the petition on file herein, upon the payment to the Motor Vehicle Department by the said L. Boteler, as such Trustee in Bankruptcy of the registration fees and license fees for the 1937 license plates upon such motor vehicles and it appearing from said petition that the petitioner herein is entitled to such 1937 license plates, certificates of ownership and registration cards, upon the payment of said registration fees and license fees upon said motor vehicles without the penalties provided for by the Vehicle Code of the State of California, and it appearing that great and irreparable damage and injury will be caused to the bankruptcy estate herein unless the license plates, certificates of ownership and registration cards are forthwith issued to said Trustee in Bankruptcy upon said motor vehicles, and it further appearing that the



petitioner herein has no plain, speedy or adequate remedy in the course of law;

Now, therefore, you are hereby commanded, ordered and enjoined, upon the receipt of this order, to forthwith issue to the petitioner herein, as such Trustee in Bankruptcy, the 1937 license plates, certificates of ownership and registration cards, upon the motor vehicles described in said petition upon the payment to the Motor Vehicle Department of the State of California, the registration fees and the license fees [fol. 17] for the year 1937 without the penalties provided by said Vehicle Code of the State of California or that you show cause before this Court at the courtroom thereof at Room 475, Pacific Electric Building, Sixth and Main Streets, County of Los Angeles, State of California, on the 6th day of July, 1937 at 10 o'clock A. M. of said day, why you have not done so.

It is further ordered that service of a copy of the Petition for Mandatory Injunction and this Order upon said Ray Ingels, Director of Motor Vehicles of the State of California, and said Howard E. Deems, Registrar of Motor Vehicles of the State of California, or either of them, made on or before the 1st day of July, 1937, shall be sufficient service.

Witness the Honorable George Cosgrave, Judge of the District Court of the United States, Southern District of California, Central Division.

Attest my hand and the seal of said court, this 26 day of June, 1937. George Cosgrave, Judge.

X

At the time fixed in said order, said respondents named therein filed their motion to dismiss the petition for mandatory injunction, as follows:

[fol. 18] MOTION TO DISMISS

Come now respondents Ray Ingels, as Director, and Howard E. Deems, as Registrar, of the Department of Motor Vehicles of the State of California, against whom the petition for mandatory injunction is directed, and move this Honorable Court to dismiss said petition on the following grounds, to-wit:

I

That the Court is without jurisdiction of the subject of the action.

## II

That said petition does not state facts sufficient to constitute grounds for relief of any nature against the said Ray Ingels and Howard E. Deems, or either of them.

## III

That it appears upon the face of said petition that petitioner will not suffer great or irreparable injury.

## IV

That petitioner has a plain, adequate and complete remedy at law.

## V

That said petition does not state facts sufficient to constitute a valid cause of action in equity or at all against these respondents or either of them or at all.

## VI

That said petition does not state facts sufficient to justify the issuance of an injunction of any nature herein.

[fol. 19]

## VII

That this court does not have summary jurisdiction over the State of California or any of its officers, in this bankruptcy proceeding, to grant the relief prayed for or any relief; the trustee's remedy, if any, is by plenary suit.

Dated the 6th day of July, 1937.

U. S. Webb, Attorney General of the State of California, by John O. Palstine, Deputy Attorney General of the State of California, Attorneys for Respondents.

## XI

Said motion to dismiss was denied, whereupon said respondents filed their answer to said petition for mandatory injunction, as follows:

## ANSWER TO PETITION

Come now the respondents Ray Ingels, as Director, and Howard E. Deems, as Registrar, of the Department of Motor Vehicles of the State of California, and answer the

Petition for Mandatory Injunction filed herein on or about the 26th day of June, 1937, as follows, and make said answer their return to the Alternative Writ issued upon said Petition for Mandatory Injunction;

### I

Admit the allegations in Paragraph II of said Petition, but in this regard further allege that the order of this Court of December 22, 1936, directing the liquidation of the assets of the above named debtor, authorized said John H. Chamness, as temporary trustee, to continue to operate the business of said debtor until the appointment of a permanent trustee, and the said temporary trustee did so operate said [fol. 20] business from September 16, 1936, to January 20, 1937, inclusive, and in this connection did continuously use and operate, upon the public highways of the State of California, the motor vehicles particularly described in said Petition herein.

### II

Admit the allegations of Paragraph III of said Petition, but in this regard allege that the order appointing L. Boteler, petitioner herein, as trustee herein, authorized said trustee to continue to operate the business of said debtor and that said trustee did so operate said business from January 21, 1937, to February 27, 1937, inclusive, and in this connection did continuously use and operate, upon the public highways of the State of California, said motor vehicles particularly described in said Petition herein.

### III

Deny each and all of the allegations of Paragraph IV of said Petition.

### IV

Deny each and all of the allegations of Paragraph VI of said Petition, except that said respondents admit that they have, and each of them has, refused to issue the 1937 license plates authorizing the use of certain of the motor vehicles described in said paragraph upon the public highways of the State of California, until and unless the fees and penalties prescribed by law were paid to the Motor Vehicle Department of the State of California.

[fol. 21]

## V

Deny each and all of the allegations of Paragraph VII of said Petition.

## VI

Deny each and all of the allegations of Paragraph VIII of said Petition, except that said respondents admit that said petitioner as trustee herein has undertaken and agreed to sell a number of said motor vehicles.

## VII

Deny each and all of the allegations of Paragraph IX of said Petition, except that said respondents admit said petitioner has heretofore sold, pursuant to order of the Referee herein, a number of the aforesaid motor vehicles, and that the Motor Vehicle Department of the State of California claims to have and does have a lien upon all of said vehicles to secure the payment of the license fees and penalties prescribed by law.

As a Second Further and Separate Defense, said respondents allege and each of them alleges:

## I

That this Court has no jurisdiction in this summary proceeding, to grant the relief prayed for in said Petition, or any of said relief, or any relief at all, against these respondents, or either of them, upon the allegations in said Petition set forth.

Wherefore, said respondents pray, and each of them prays, that the petitioner take nothing by his Petition herein, and that said respondents, and each of them, may go hence with their costs and such other and further relief to said [fol. 22] respondents and each of them as to the Court may seem meet and proper.

Ray Ingels, Director of Motor Vehicles of the State of California, Howard E. Deeds, Registrar of Motor Vehicles of the State of California, Respondents.  
U. S. Webb, Attorney General of the State of California, by John O. Palestine, Deputy Attorney General, Attorneys for said Respondents.

## XII

Evidence, both oral and documentary, was thereupon offered and received at said hearing. Said evidence was the same as that offered and received in said proceeding before the Referee in Bankruptcy herein upon which the Referee's aforesaid order of June 14, 1937, was made. The statement of said evidence stipulated to and settled by the court in the appeal heretofore taken from the order of the above entitled District Court affirming said order of the Referee dated June 14, 1937, and incorporated in the transcript of record on said appeal, being No. 8711 before the United States Circuit Court of Appeals for the Ninth Circuit, is hereby referred to and incorporated herein as a part of this agreed statement, with the understanding that such statement of evidence may be used also in this appeal. The matter was duly submitted to said District Court and said court there-[fol. 23] after, on or about January 3, 1938, made its findings of fact and conclusions of law as follows:

## FINDINGS OF FACT

## I

The court finds that at all times mentioned herein, Richmaid Creameries, Inc., was a corporation duly organized and existing under and by virtue of the laws of the State of California and having its principal place of business in Wilmington, California.

## II

The court further finds that on or about the 16th day of September, 1936, said Richmaid Creameries, Inc., debtor herein, filed a petition under the provisions of Section 77b of the National Bankruptcy Act, as amended, in the above entitled court; that on the said day, pursuant to said petition, the court appointed one, John H. Chamness, temporary trustee with authority to operate the business of the debtor and that the said John H. Chamness, as such temporary trustee, operated said business at a loss and that on the 10th day of December, 1936, a petition was filed herein seeking an order to require the temporary trustee to liquidate the estate of said debtor and that pursuant to said petition, this court, on the 22nd day of December, 1936, entered its order for the liquidation of the assets of said debtor and referred the case



to the Honorable Ernest R. Utley, as referee, for further administration, pursuant to the provisions of Section 77b of the National Bankruptcy Act.

### III

The court further finds that on or about the 21st day of January, 1937, L. Boteler was duly appointed Trustee in [fol. 24] Bankruptcy in said proceeding and immediately thereafter duly qualified and took possession of the assets of the debtor, including twenty-seven (27) trucks and automobiles described in said petition.

### IV

The court further finds that the temporary trustee herein ever since his appointment on the 16th day of September, 1936, and continuing up to the 20th day of January, 1937, did not have sufficient funds with which to purchase the 1937 license plates upon said motor vehicles and the court further finds that the permanent trustee herein did not have sufficient funds between the date of his appointment on the 21st day of January, 1937 and the 27th day of February, 1937 with which to purchase said license plates for said motor vehicles.

### V

The court further finds that while the said temporary trustee and the said permanent trustee had some funds come into their possession that the same were insufficient to pay for the daily merchandise used by said trustee and that during the said trusteeship there became due and owing to thirty four (34) employees of said bankrupt, labor claims in the sum of \$4,633.53 which said trustee was unable to pay because of lack of funds; that during the same period the said trustee became indebted to twenty eight (28) preferred creditors by reason of merchandise sold and delivered to said bankrupt by said creditors in the total sum of \$5,665.73 which said trustee was unable to pay because of insufficient funds in his possession, and the court further finds that during the said period commencing on the 16th day of September, 1936 and ending January 19, 1937, the trustee sustained an operating loss of \$9,641.42.

[fol. 25]

### VI

The court further finds that at all times mentioned herein, Ray Ingels was and still is the Director of the Department

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of Motor Vehicles of the State of California, and Howard E. Deems was and still is the Registrar of Motor Vehicles of the State of California.

## VII

The court further finds that immediately after the consummation of a sale of some of the assets of said debtor, to-wit, on or about March 1, 1937, and, as soon as the trustee had funds in his possession available for said purpose, the trustee, on or about the 1st day of March, 1937, tendered and offered to pay to the Department of Motor Vehicles of and for the State of California, the proper registration fees and vehicle license fees for the year 1937 upon all of the motor vehicles described in said petition and that the said Ray Ingels, as such Director of Motor Vehicles and the said Howard E. Deems, as such Registrar of Motor Vehicles, and each of them, have refused to issue the 1937 license plates upon said motor vehicles to the trustee herein unless said trustee pays in addition to the usual and proper fees, the penalties assessed against such motor vehicles, which penalties consist of one hundred per cent of the registration fee and fifty per cent of the vehicle license fee.

## VIII

That prior to the said 1st day of March, 1937, the trustee had no funds available for the purpose of paying such registration and license fees and the court further finds that said [fol. 26] trustee had agreed to sell a number of said motor vehicles and that he has been unable to sell and dispose of the same by reason of the refusal of the said Ray Ingels, Director of Motor Vehicles and the said Howard E. Deems, as Registrar of Motor Vehicles of and for the State of California, to issue said license plates upon the payment of the fees owing thereon without such penalties; and the court further finds that the trustee herein is unable to properly liquidate the assets of said bankrupt estate until the license plates upon said motor vehicles are duly issued and that great and irreparable injury and damage will be caused to the bankruptcy estate herein unless the license plates, certificates of ownership and registration cards upon said motor vehicles are forthwith issued to said trustee.

## IX

The court further finds that pursuant to the order of the referee in bankruptcy herein a number of motor vehicles

aforesaid had been sold by the trustee herein and that the said trustee is unable to deliver clear title to said motor vehicles because of the refusal of the said Ray Ingels, Director of Motor Vehicles and the said Howard E. Deems, Registrar of Motor Vehicles of the State of California, to issue the license plates, certificates of ownership and registration cards thereon.

## CONCLUSIONS OF LAW

As Conclusions of Law, the court finds:

### I

That the Trustee in Bankruptcy is entitled to the certificates of ownership, registration cards and the 1937 license [fol. 27] plates upon the payment by the trustee of the registration fee and vehicle license fees for the year 1937 without the penalties provided by the Vehicle Code of the State of California as amended, and the Vehicle License Fee Act of the State of California as amended, California Statutes of 1935, Chapter 362, as amended.

### II

The court further finds that the said Trustee in Bankruptcy shall be and is hereby entitled to an order directing and enjoining said Ray Ingels as Director of Motor Vehicles and said Howard E. Deems, as Registrar of Motor Vehicles of the State of California; and each of them, their agents, servants and employees to issue to said Trustee in Bankruptcy, a certificate of ownership, registration card and 1937 license plate upon said motor vehicles upon the payment by said Trustee of the registration fee, and vehicle license fees for the year 1937 without the penalties provided by the said Vehicle Code of the State of California as amended, and the Vehicle License Fee Act of the State of California as amended, California Statutes of 1935, Chapter 362, as amended.

Witness the Honorable George Cosgrave, Judge of the District Court of the United States, Southern District of California, Central Division.

Attest my hand and the seal of said court this 3rd day of January, 1938.

George Cosgrave, Judge.

[fol. 28] Not approved as to form, for reasons which will be stated in formal objections.

U. S. Webb, Attorney General, by John O. Palstine,  
Deputy Attorney General.

### XIII

Also, on said 3rd day of January, 1938, said District Court made and entered its decree herein as follows:

#### DECREE

It Is Hereby Ordreded, Adjudged and-Decreed:

That the respondents herein, Ray Ingels, Director of the Department of Motor Vehicles of the State of California and Howard E. Deems, Registrar of Motor Vehicles of the State of California, and each of them, their agents, servants and employees, be, and they are hereby ordered and enjoined to issue to the said petitioner, L. Boteler, Trustee in Bankruptcy of Richmaid Creameries, Inc., a certificate of ownership and registration card and the 1937 license plates, in the manner provided by the laws of the State of California, upon each of the following motor vehicles, or either of them, upon the payment to the said Motor Vehicle Department of the registration fee and vehicle license fee for the year 1937 without the penalty and/or penalties provided by the Vehicle Code of the State of California as amended, and the Vehicle License Fee Act of the State of California as amended, California Statutes of 1935, Chapter 362, as amended.

[fol. 29]

Description of Vehicle	Engine Number	1936 License
Ford V-8	18-800655	2X7140
Ford-4	AA12550	K-6764
Ford V-8	1245685	K-6773
Ford V-8	18-725243	K-6770
Ford-4	AA4078994	K-6771
Ford-4	AA1958177	K-6772
Ford-4	AAB5057502	K-6767
Ford-4	AA3303515	K-6769
Ford V-8	1697695	K-7838
Ford-4	LB10372	K-6768
Ford-4	A287871	2Y8393
Chevrolet-6	T4648696	K-6766
Ford-4	AA4778199	K-6765
Homemade	DMV844687	76026
Ford V-8	18-1984288	1Y9493



Description of Vehicle	Engine Number	1936 License
Ford V-8	18-2003574	2Y8394
Dodge-6	T12-9416	7Y537
Ford V-8	1655069	2Y8396
Ford V-8	1294772	PC04133
Chevrolet-6	K4831949	PCK6399
Dodge-4	A525823	2Y7141
Ford-4	AA3827503	K6925
Ford V-8	18-1294156	6Y6552
Ford V-8	18-1640707	2Y8395
International-6	H033321	K2192
Terraplane-6	65611	2X7142

[fol. 30] Witness the Honorable George Cosgrave, Judge of the District Court of the United States, Southern District of California, Central Division.

Attest my hand and the seal of said court, this 3rd day of January, 1938.

George Cosgrave, Judge.

Approved As to Form without waiving right to object to Findings of Fact and Conclusions of Law.

U. S. Webb, Attorney General, by John O. Palestine, Deputy Attorney General, Attorneys for State of California, et al. David Schwartz, Attorney for L. Boteler, Trustee, U. S. Webb, Attorney General, by John O. Palestine, Deputy Attorney General, Attorneys for Ray Ingels, Director of Motor Vehicles of the State of California, and Howard E. Deems, as Registrar of Motor Vehicles of the State of California.

[fol. 31] IN UNITED STATES DISTRICT COURT

#### ORDER APPROVING AGREED STATEMENT OF FACTS

The foregoing agreed statement of facts, duly proposed and agreed upon by counsel for the respective parties, constitutes a correct statement of all the evidence herein relating to that certain order by the District Court herein dated January 3, 1938, as in said agreed statement more particularly referred to, and said agreed statement of facts is hereby approved and adopted as a full and complete statement of all the facts and proceedings upon which any appeal from said order of January 3, 1938, may be based.

Dated: Feb. 10, 1938.

Geo. Cosgrave, Judge.

[File endorsement omitted.]

[fol. 32] IN UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 28563-C

In the Matter of RICHMAID CREAMERIES, INC., a Corporation,  
Debtor

PETITION FOR APPEAL AND ORDER ALLOWING APPEAL—Filed  
Feb. 2, 1938

To the Honorable George Cosgrave, Judge of the United  
States District Court, Southern District of California,  
Central Division:

Ray Ingels, as Director of the Motor Vehicle Department of the State of California, and Howard E. Deems, as Registrar of Motor Vehicles of the State of California, feeling themselves aggrieved by the order of the above court dated January 3, 1938, ordering and enjoining them, their agents, servants and employees, to issue to L. Boteler, Trustee in Bankruptcy of Richmaid Creameries, Inc., certificates of ownership and registration cards and the 1937 license plates in the manner provided by the laws of the State of California, upon certain motor vehicles in said order described, upon the payment to said Motor Vehicle Department of the registration fee and vehicle license fee for the year 1937 without the penalty and/or penalties provided by the Vehicle Code of the State of California as amended, and the Vehicle License Fee Act of the State of California as amended,

[fol. 33] Pray for the Allowance of an Appeal from said order to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignments of error filed herewith, and pray that citation be issued as provided by law and that a transcript of the record, proceedings and documents upon which said order was based, duly authenticated, be sent to said Circuit Court of Appeals, and pray that an order be made fixing the amount of any bond required of appellants herein.

Dated: February 2nd, 1938.

U. S. Webb, Attorney General, by John O. Palestine,  
Deputy Attorney General, Attorneys for said proposed appellants.

## ORDER ALLOWING APPEAL

Upon reading the foregoing petition for appeal, and upon the files and records herein,

It is Ordered that an appeal be, and the same is hereby allowed to Ray Ingels as Director of the Motor Vehicle Department of the State of California, and Howard E. Deems as Registrar of Motor Vehicles of the State of California, to have the United States Circuit Court of Appeals for the Ninth Circuit review the order of this court dated January 3, 1938, ordering and enjoining said Ray Ingels as [fol. 34] Director of Motor Vehicles, and said Howard E. Deems, as Registrar of Motor Vehicles of the State of California, their agents, servants and employees, to issue certain motor vehicle license plates without the payment of the penalty and/or penalties provided by the Vehicle Code of the State of California as amended, and the Vehicle License Fee Act of the State of California as amended; and

It is Further Ordered that citation be issued as provided by law, and that a transcript of the record be prepared by the clerk of this court and transmitted to said Circuit Court of Appeals so that he shall have the same in said court within thirty days of this date.

It is Further Ordered that cost bond in said appeal be and the same is hereby fixed in the sum of Two Hundred Fifty Dollars (\$250.00), the clerk to approve said bond.

Dated: February 2, 1938.

Geo. Cosgrave, Judge.

[File endorsement omitted.]

[fol. 35] IN UNITED STATES DISTRICT COURT

No. 28563-C

ASSIGNMENT OF ERRORS—Filed Feb. 2, 1938

Come now Ray Ingels, as Director of the Motor Vehicle Department of the State of California, and Howard E. Deems, as Registrar of Motor Vehicles of the State of California, and respectfully urge that the above entitled court erred in making its order of January 3, 1938, ordering and enjoining them, their agents, servants and employees, to issue certain motor vehicle license plates and

certificates of ownership and registration cards without the payment of the penalty and/or penalties provided by the Vehicle Code of the State of California as amended, and the Vehicle License Fee Act of the State of California as amended, and present in connection with their petition for appeal from said order, the following assignments of error:

### I

That said court erred in failing to grant the motion of said respondents to dismiss the petition of the Trustee in Bankruptcy herein for mandatory injunction.

### II

That said court erred in granting the relief prayed for in said petition or any relief in the face of the affirmative defense raised by these appellants denying summary jurisdiction in said court.

### III

That said court erred in failing to find that said Trustees, and each of them, had operated upon the public highways of the State of California during 1937 and prior to February 4, 1937, the motor vehicles involved herein, and that such operation of such motor vehicles was in connection with the operation by the said Trustees of the business of said debtor and bankrupt, as alleged in the affirmative allegations in paragraphs I and II of the answer to petition for mandatory injunction.

### IV

That the findings of said court that neither of the Trustees herein had any funds with which to pay on or before February 4, 1937, the fees in question, and that the tender of fees was made as soon as the Trustee had funds in his possession "available" for that purpose, are contrary to the law, the evidence and records herein, and are mere conclusions.

### V

That the findings of said court that the Trustee herein tendered to the Department of Motor Vehicles of the State of California the "proper" registration fees and vehicle license fees for the year 1937 upon the vehicles here in question, and that said Department and the respondent officers thereof refused to issue the 1937 license plates upon

said vehicles unless said Trustee paid, in addition to the "usual and proper" fees, the penalties assessed against said vehicles, are contrary to the law, the evidence and records herein, and are mere conclusions.

## VI

That the findings of said court that the Trustee "has been unable to sell and dispose of" certain motor vehicles and is unable to deliver clear title thereto by reason of the refusal of said officers of the Department of Motor Vehicles to issue license plates thereon upon the payment of the principal of the fees without any penalties thereon for delinquency, and that the Trustee is unable to properly liquidate the assets of said bankrupt estate until the license plates upon said motor vehicles are duly issued, are contrary to the law, the evidence and records herein, and are mere conclusions.

## VII

That the finding of said court that great and irreparable injury and damage will be caused to this estate unless said plates are issued to the Trustee is contrary to the evidence and records herein, and is a mere conclusion.

## VIII

That said court erred in failing to find in favor of the respondents and appellants on the second and affirmative defense raised by said respondents, challenging the summary jurisdiction of said court.

## IX

That said court erred in failing to make its conclusion of law that upon the facts herein said court did not have summary jurisdiction to grant the relief prayed for by the Trustee, or any of said relief, or any relief at all.

## X

That the conclusion of law made by said court that the Trustee in Bankruptcy herein is entitled to the certificates of ownership, registration cards and 1937 license plates upon the payment by the Trustee of the registration fee and vehicle license fees for the year 1937, without the penalties



provided by the Vehicle Code of the State of California as [fol. 38] amended, and the Vehicle License Fee Act of the State of California as amended, is not supported by the evidence or the findings herein, and is contrary to law and in excess of said court's jurisdiction.

## XI

That the conclusion of law of said court that said Trustee in Bankruptcy is entitled to an order directing and enjoining Ray Ingels, as Director of Motor Vehicles, and Howard E. Deems, as Registrar of Motor Vehicles of the State of California, and each of them, their agents, servants and employees, to issue to said Trustee in Bankruptcy a certificate of ownership, registration card and 1937 license plate upon the motor vehicles involved herein, upon the payment by said Trustee of the registration fee and vehicle license fee for the year 1937 without the penalties provided by said Vehicle Code of the State of California as amended, and the Vehicle License Fee Act of the State of California as amended, is not supported by the evidence or the findings herein, and is contrary to law and in excess of said court's jurisdiction.

## XII

That the order of said court, directing and enjoining said Ray Ingels, as Director of the Department of Motor Vehicles of the State of California, and Howard E. Deems, as Registrar of Motor Vehicles of the State of California, and each of them, their agents, servants and employees, to issue to said Trustee in Bankruptcy herein a certificate of ownership and registration card, and the 1937 license plates upon the vehicles involved herein, in the manner provided by [fol. 39] the laws of the State of California upon the payment to said Motor Vehicle Department of the registration fee and vehicle license fee for the year 1937, without the penalty and/or penalties provided by the Vehicle Code of the State of California as amended, and the Vehicle License Fee Act of the State of California as amended, is not supported by the evidence or the findings herein, and is contrary to law and in excess of said court's jurisdiction.

U. S. Webb, Attorney General, by John O. Palstine, Deputy Attorney General, Attorneys for the proposed appellants.

[File endorsement omitted.]

[fol. 40] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR  
THE NINTH CIRCUIT

No. 8761

In the Matter of RICHMAID CREAMERIES, INC., a corporation,  
Debtor,

RAY INGELS, Director of Motor Vehicles of the State of California and Howard Deems, as Registrar of Motor Vehicles of the State of California, Appellants,

vs.

L. BOTELEK, Trustee of Richmaid-Creameries, Inc., a corporation, Debtor, Appellee

PETITION FOR APPEAL—Filed February 2, 1938

To the Honorable Justices of the above entitled court:

The Honorable Geo. Cosgrave, Judge of the District Court of the United States, Southern District of California, Central Division, having, on January 3, 1938, made an order in the above bankruptcy proceeding, directing and enjoining Ray Ingels, Director of Motor Vehicles of the State of California, and Howard E. Deems, Registrar of Motor Vehicles of said State, and each of them, their agents, servants and employees, to issue to L. Boteler, trustee in bankruptcy [fol. 41] herein, the California certificates to file in said bankruptcy proceeding their claim of ownership, registration cards, and vehicle license plates, upon certain motor vehicles owned by the bankrupt herein, upon the payment to the Motor Vehicle Department of the State of California of the registration and license fees required by the Vehicle Code and the Vehicle License Fee Act of said State, without the payment of the penalties prescribed by said Acts for delinquency, and overruling the objection of said officers to the summary jurisdiction of said Court, and said officers feeling themselves aggrieved by said order of said judge,

Said Ray Ingels, Director of Motor Vehicles of the State of California, and Howard E. Deems, as Registrar of Motor Vehicles of the State of California, do hereby petition for the Allowance of an appeal from said order of said District Court to the United States Circuit Court of Appeals, for the Ninth Circuit, for the reasons and upon the grounds set

forth in the assignment of errors filed herewith, and said petitioners pray that their appeal may be allowed and a citation issued directed to L. Boteler, trustee of Richmaid Creameries, Inc., a corporation, debtor, commanding him to appear before said United States Circuit Court of Appeals, for the Ninth Circuit, to do and receive what may be required in the interests of justice in the premises, and that a transcript of the record, exhibits, statement of evidence, stipulations, pleadings, and all proceedings herein, duly authenticated, may be transmitted to said United States Circuit Court of Appeals, for the Ninth Circuit, or for such other and further relief as may be meet and proper in the premises.

[fol. 42] Attached hereto, marked Exhibit "A", and hereby made a part hereof as though set forth herein in full, is a copy of the agreed statement of the case upon which it is proposed to submit said appeal, if allowed by this Court.

Dated: February 1, 1938.

U. S. Webb, Attorney General, by John O. Palstine, Deputy Attorney General, Attorneys for Ray Ingels, Director of Motor Vehicles of the State of California, and Howard E. Deems, Registrar of Motor Vehicles of the State of California, Petitioners for appeal.

[File endorsement omitted.]

(Clerk's Note: Agreed statement referred to above as "Exhibit 'A'" is not printed here, for it is already set forth in this transcript at pages 4 to 31.)

[fol. 43] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 8761

ASSIGNMENT OF ERRORS—Filed February 2, 1938

Come now Ray Ingels, as Director of the Motor Vehicle Department of the State of California, and Howard E. Deems, as Registrar of Motor Vehicles of the State of California, and respectfully urge that the above entitled court erred in making its order of January 3, 1938, ordering and enjoining them, their agents, servants and employees, to issue certain motor vehicle license plates and certificates of

ownership and registration cards without the payment of the penalty and/or penalties provided by the Vehicle Code of the State of California as amended, and the Vehicle License Fee Act of the State of California as amended, and present in connection with their petition for appeal from said order, the following assignments of error:

### I

That said court erred in failing to grant the motion of said respondents to dismiss the petition of the Trustee in Bankruptcy herein for mandatory injunction.

### II

That said court erred in granting the relief prayed for in said petition or any relief in the face of the affirmative defense raised by these appellants denying summary jurisdiction in said court.

### III

That said court erred in failing to find that said Trustees, and each of them, had operated upon the public highways of the State of California during 1937 and prior to February 4, 1937, the motor vehicles involved herein; and that such operation of such motor vehicles was in connection with the operation by the said Trustees of the business of said debtor and bankrupt, as alleged in the affirmative allegations in paragraphs I and II of the answer to petition for mandatory injunction.

### IV

That the findings of said court that neither of the Trustees herein had any funds with which to pay on or before February 4, 1937, the fees in question, and that the tender of fees was made as soon as the Trustee had funds in his possession "available" for that purpose, are contrary to the law, the evidence and records herein, and are mere conclusions.

### V

That the findings of said court that the Trustee herein tendered to the Department of Motor Vehicles of the State of California the "proper" registration fees and vehicle license fees for the year 1937 upon the vehicles here in question, and that said Department and the respondent offi-

cers thereof refused to issue the 1937 license plates upon said vehicles unless said Trustee paid, in addition to the "usual and proper" fees, the penalties assessed against said vehicles, are contrary to the law, the evidence and records herein, and are mere conclusions.

## VI

That the findings of said court that the Trustee "has been unable to sell and dispose of" certain motor vehicles and is unable to deliver clear title thereto by reason of the refusal of said officers of the Department of Motor Vehicles to issue license plates thereon upon the payment of the principal of the fees without any penalties thereon for delinquency, and that the Trustee is unable to properly liquidate the assets of said bankrupt estate until the license plates upon said motor vehicles are duly issued, are contrary to the law, the evidence and records herein, and are mere conclusions.

## VII

That the findings of said court that great and irreparable injury and damage will be caused to this estate unless said plates are issued to the Trustee is contrary to the evidence and records herein, and is a mere conclusion.

## VIII

That said court erred in failing to find in favor of the respondents and appellants on the second and affirmative defense raised by said respondents, challenging the summary jurisdiction of said court.

## IX

That the said court erred in failing to make its conclusion of law that upon the facts herein said court did not have summary jurisdiction to grant the relief prayed for by the Trustee, or any of said relief, or any relief at all.

## X

That the conclusion of law made by said court that the Trustee in Bankruptcy herein is entitled to the certificates of ownership, registration cards and 1937 license plates upon the payment by the Trustee of the registration fee [fol. 46] and vehicle license fees for the year 1937, without



the penalties provided by the Vehicle Code of the State of California as amended, and the Vehicle License Fee Act of the State of California as amended, is not supported by the evidence or the findings herein, and is contrary to law and in excess of said court's jurisdiction.

## XI

That the conclusion of law of said court that said Trustee in Bankruptcy is entitled to an order directing and enjoining Ray Ingels, as Director of Motor Vehicles, and Howard E. Deems, as Registrar of Motor Vehicles of the State of California, and each of them, their agents, servants and employees, to issue to said Trustee in Bankruptcy a certificate of ownership, registration card and 1937 license plate upon the motor vehicles involved herein, upon the payment by said Trustee of the registration fee and vehicle license fee for the year 1937 without the penalties provided by said Vehicle Code of the State of California as amended, and the Vehicle License Fee Act of the State of California as amended, is not supported by the evidence or the findings herein, and is contrary to law and in excess of said court's jurisdiction.

## XII

That the order of said court, directing and enjoining said Ray Ingels, as Director of the Department of Motor Vehicles of the State of California, and Howard E. Deems, as Registrar of Motor Vehicles of the State of California, [fol. 47] and each of them, their agents, servants and employees, to issue to said Trustee in Bankruptcy herein a certificate of ownership and registration card, and the 1937 license plates upon the vehicles involved herein, in the manner provided by the laws of the State of California upon the payment to said Motor Vehicle Department of the registration fee and vehicle license fee for the year 1937, without the penalty and/or penalties provided by the Vehicle Code of the State of California as amended, and the Vehicle License Fee Act of the State of California as amended, is not supported by the evidence or the findings herein, and is contrary to law and in excess of said court's jurisdiction.

U. S. Webb, Attorney General, by John O. Palstine,  
Deputy Attorney General, Attorneys for the Proposed Appellants.

[File endorsement omitted.]

[Endorsed]: Filed R. S. Zimmerman Clerk at 18 min. past 11 o'clock Feb. 15, 1938 a. m. By E. L. Smith, Deputy Clerk.

[fol. 48] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER ALLOWING APPEAL—February 11, 1938

Upon consideration of the petition of Ray Ingels, Director of Motor Vehicles of the State of California, et al., for allowance of appeal herein under section 24(b) of the Bankruptcy Act, filed February 2, 1938, and of the assignments of error thereon, filed therewith, and by direction of the court,

[fol. 49] It Is Ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the order of the District Court of the United States for the Southern District of California, Central Division, made on January 3, 1938, be, and hereby is allowed, conditioned upon the giving of a cost bond in the sum of Two Hundred and Fifty Dollars (\$250.00) with good and sufficient security, within ten days from date.

It Is Further Ordered that since this is the second appeal in this cause, if a cost bond has heretofore been given on the appeal first allowed in this cause then no additional cost bond need be given on this appeal.

I Hereby Certify that the foregoing is a full, true, and correct copy of an original Order made and entered in the within-entitled cause.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 11th day of February, A. D. 1938.

Paul P. O'Brien, Clerk, U. S. Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed R. S. Zimmerman, Clerk at 18 min. past 11 o'clock Feb. 15, 1938 a. m. By E. L. Smith, Deputy Clerk.

[fol. 50] IN UNITED STATES DISTRICT COURT

In Bankruptcy. No. 28563-C

STIPULATION IN LIEU OF PRAECIPE—Filed February 17, 1938

To the Clerk of the Above Entitled Court:

We hereby respectfully request you to prepare and certify to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, the transcript of record on the appeal to said Circuit Court to reverse the decree and order made by said District Court on January 3, 1938, directing and enjoining Ray Ingels, as Director of Motor Vehicles of the State of California, and Howard E. Deems, as Registrar of Motor Vehicles of said State to do and perform certain acts, and include in said transcript the following papers and documents on file in said District Court:

1. Agreed Statement of Case.
2. Petition for appeal and order allowing same, and assignments of error, filed in the United States District Court.
3. Citation issued by said District Court.
4. Copies of Petition for Appeal, assignments of error and order allowing appeal, filed in the United States Circuit Court of Appeals for the Ninth Circuit.
5. Copy of Citation issued by said Circuit Court.
6. This Praecipe.



It is hereby stipulated that the foregoing shall constitute the transcript of record herein on this appeal. It is further stipulated that in lieu of copying the names and titles of the court, the title and number to the cause, the same may, in said transcript of record on this appeal be abbreviated as follows: (Title of court and cause).

Dated: February 14, 1938.

DAVID SCHWARTZ

Attorney for L. Boteler, Trustee in Bankruptcy,  
appellee;

U. S. WEBB;

Attorney General,

By JOHN O. PALSTINE,

Deputy Attorney General,

Attorneys for Ray Ingels, as Director of Motor  
Vehicles of the State of California, and Howard  
E. Deems, as Registrar of Motor Vehicles of the  
State of California.

[Endorsed]: Filed R. S. Zimmerman Clerk at  
13 min. past 3 o'clock, Feb. 17, 1938 P. M. By M. J.  
Sommer, Deputy Clerk.



[Title of District Court and Cause.]

### CLERK'S CERTIFICATE

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 51 pages, numbered from 1 to 51, inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellants, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation in the United States District Court; citation in the United States Circuit Court; agreed statements of the case; petition for appeal and order allowing appeal and assignment of errors in the United States District Court; petition for appeal, assignment of errors, and order allowing appeal in the United States Circuit Court, and stipulation in lieu of praecipe.

I do further certify that the amount paid for printing the foregoing record on appeal is \$89.60 and that said amount has been paid the printer by the appellants herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to \$12.30 and that said amount has been paid me by the appellants herein.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this 1st day of March, in the year of Our Lord One Thousand Nine Hundred and Thirty-eight and of our Independence the One Hundred and Sixty-second.

[Seal]

R. S. ZIMMERMAN,  
Clerk of the District Court of the  
United States of America, in  
and for the Southern District of  
California.

By EDMUND L. SMITH,  
Deputy.

[Endorsed]: Printed Transcript of Record. Filed  
Mar. 2, 1938. Paul P. O'Brien, Clerk.



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No. 8761

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IN THE

**United States Circuit Court of Appeals**

**For the Ninth Circuit**

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In the Matter of /

**RICHMAID CREAMERIES, INC.,**

a corporation,

Debtor.

---

**RAY INGELS, Director of Motor Vehicles of the  
State of California, and HOWARD E. DEEMS,  
as Registrar of Motor Vehicles of the State of  
California,**

Appellants,

vs.

**L. BOTELER, Trustee of RICHMAID CREAM-  
ERIES, INC., a corporation,**

Appellee.

---

**Upon Appeal from the District Court of the United  
States for the Southern District of California,  
Central Division.**

---

**PROCEEDINGS HAD IN THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT.**





[Clerk's Note: This cause was consolidated with companion cause No. 8711, Ingels, et al. v. Boteler, for briefing, argument and decision in the United States Circuit Court of Appeals for the Ninth Circuit. Accordingly, there are not reprinted here, the order of submission, order directing filing of opinion and the opinion, which cover both companion causes, and which are printed at pages 129 to 144 of the printed proceedings in cause No. 8711.]

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United States Circuit Court of Appeals  
for the Ninth Circuit

No. 8761

RAY INGELS, etc. et al.,

Appellants,

vs.

L. BOTELER, Trustee etc.,

Appellee.

DECREE

Appeal from the District Court of the United States for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Southern District of California, and was duly submitted:

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the order

of the said District Court in this cause be, and hereby is, reversed with directions to order the registration and license fees and accrued penalties paid, or, in the alternative, ~~to permit~~ the motor vehicles to be disposed of subject to the lien of the state of California for the unpaid taxes and penalties, with costs in this court in favor of appellants and against appellee.

It is further ordered, adjudged, and decreed by this Court, that the appellants recover against the appellee for their costs herein expended; and have execution therefor.

[Endorsed]: Filed and entered Dec. 15, 1938.  
Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

**CERTIFICATE OF CLERK, U. S. CIRCUIT  
COURT OF APPEALS FOR THE NINTH  
CIRCUIT, TO RECORD CERTIFIED UN-  
DER RULE 38 OF THE REVISED RULES  
OF THE SUPREME COURT OF THE  
UNITED STATES**

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing fifty-eight (58) pages, numbered from and including 1 to and including 58, together with order of submission, order directing filing of opinion, and opinion, of this court in above cause, now appearing at pages 129 to 144 of the printed record in companion cause, No. 8711, Ingels, etc., et al. vs. Boteler, Trustee, etc., which said order of submission, order directing filing of opinion, and opinion are adopted hereby as though set forth herein, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellee, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 3rd day of March, A. D. 1939.

[Seal]

PAUL P. O'BRIEN,

Clerk.



## [fol. 60] SUPREME COURT OF THE UNITED STATES

## ORDER ALLOWING CERTIORARI—Filed April 24, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

---

Endorsed on cover: File No. 43,230; 43,231. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 15. L. Boteler, Trustee of the Estate of Richmaid Creameries, Inc., Debtor, Petitioner, vs. Ray Ingels, Director of Motor Vehicles of the State of California, et al. Term No. 16. L. Boteler, Trustee of Richmaid Creameries, Inc., Debtor, Petitioner, vs. Ray Ingels, Director of Motor Vehicles of the State of California, et al. Petition for writs of certiorari and exhibits thereto. Filed March 14, 1939. Term No. 15, O. T., 1939; 16, O. T., 1939.

(3598)



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FILE COPY

IN THE  
**SUPREME COURT**  
OF THE  
**UNITED STATES.**

OCTOBER TERM, 1938.

No. ~~14~~ 15

L. BOTELER, Trustee of the Estate of RICHMAID CREAM-  
ERIES, INC., a corporation, Debtor,

*Petitioner,*

*vs.*

RAY INGELS, Director of Motor Vehicles of the State of  
California; HOWARD E. DEEMS, as Registrar of Motor  
Vehicles of the State of California, and the MOTOR VE-  
HICLE DEPARTMENT OF THE STATE OF CALIFORNIA,

No. ~~14~~ 16 *Respondents.*

L. BOTELER, Trustee of RICHMAID CREAMERIES, INC., a  
corporation, Debtor,

*Petitioner,*

*vs.*

RAY INGELS, Director of Motor Vehicles of the State of  
California, and HOWARD E. DEEMS as Registrar of Mo-  
tor Vehicles of the State of California,

*Respondents.*

PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE NINTH CIRCUIT, AND  
BRIEF IN SUPPORT THEREOF.

THOMAS S. TOBIN,

633 Subway Terminal Bldg., Los Angeles, Cal.,

*Counsel for Petitioner.*

DAVID SCHWARTZ,

RAPHAEL DECHTER,

JOSEPH J. RIFKIND,

*Of Counsel.*



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IN THE  
**SUPREME COURT**  
OF THE  
**UNITED STATES.**

\_\_\_\_\_  
OCTOBER TERM, 1938.  
\_\_\_\_\_

No. \_\_\_\_\_

L. BOTELER, Trustee of the Estate of RICHMAID CREAM-  
ERIES, INC., a corporation, Debtor,

*Petitioner,*

*vs.*

RAY INGELS, Director of Motor Vehicles of the State of  
California; HOWARD E. DEEMS, as Registrar of Motor  
Vehicles of the State of California, and the MOTOR VE-  
HICLE DEPARTMENT OF THE STATE OF CALIFORNIA,

*Respondents.*

\_\_\_\_\_  
No. \_\_\_\_\_

L. BOTELER, Trustee of RICHMAID CREAMERIES, INC., a  
corporation, Debtor,

*Petitioner,*

*vs.*

RAY INGELS, Director of Motor Vehicles of the State of  
California, and HOWARD E. DEEMS as Registrar of Mo-  
tor Vehicles of the State of California,

*Respondents.*

\_\_\_\_\_  
**PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE NINTH CIRCUIT.**

L. Boteler, Trustee of the Estate of Richmaid Creameries, Inc., a bankrupt corporation, as your petitioner, respectfully prays that a Writ of Certiorari issue to review a judgment entered December 15, 1938, in the United States Circuit Court of Appeals for the Ninth Circuit in cases numbers 8711 and 8761 entitled "Ray Ingels, Director of Motor Vehicles of the State of California, Howard E. Deems, as Registrar of Motor Vehicles of the State of California, and the Motor Vehicle Department of the State of California, Appellants, vs. L. Boteler, Trustee of the Estate of Richmaid Creameries, Inc., a corporation, Debtor, Appellee." and "Ray Ingels, Director of Motor Vehicles of the State of California, and Howard E. Deems, as Registrar of Motor Vehicles of the State of California, Appellants, vs. L. Boteler, Trustee of Richmaid Creameries, Inc., a corporation, Appellee." These cases are both based upon the same facts and were consolidated in the Circuit Court for purposes of briefing and were determined by the Honorable Circuit Court in a single decision. It will serve the purposes of convenience of this Honorable Court that the two cases be treated as consolidated herein.

### Questions Presented.

Is a bankrupt estate liable for penalties imposed by state statutes for non-payment of automobile license fees where license fees and penalties claimed accrued during operation for purposes of liquidation of the business of the bankrupt estate by the Trustee in Bankruptcy?

### Statement.

Briefly stated, the facts upon which the foregoing question arose, are as follows:

(The statement of facts following is digested from the opinion of the Honorable Ninth Circuit Court of Appeals.)

Richmaid Creameries, Inc., was engaged in the creamery business and owned certain milk and ice-cream routes, operating twenty-seven automobiles and trucks in the course of such business. Under date of September 26, 1936, it filed its petition under section 77B of the Bankruptcy Act. A temporary Trustee was appointed. Thereafter and on December 22, 1936, the District Court finding that the operations of the temporary Trustee resulted only in loss, entered its order of liquidation and referred the case to the Referee in Bankruptcy. On January 20, 1937, L. Boteler was appointed Trustee in Bankruptcy for the purpose of liquidating the assets of Richmaid Creameries, Inc. Inasmuch as the assets were of little value in liquidation unless deliveries on the milk and ice cream routes were maintained, the Trustee continued to operate the business until February 28, 1937, when the Referee in Bankruptcy approved a sale of the routes and certain equipment. In order to keep operating, upon a number of occasions, the Trustee was compelled to advance his own personal funds to the estate so that there would be no cessation in the making of deliveries.

The California Motor Vehicle license fees become due on January 1st of each year. If such fee is not paid with-

in thirty days a penalty designated by statute attaches. The penalty is added to the fee on all applications for renewals and transfers on and after February 5. The California statute further provides that the fees and penalties constitute a lien on the vehicle from which such fee and penalty is due from the time the same becomes due.

On or about February 27, 1937, the Trustee applied to the Department of Motor Vehicles of the State of California for 1937 license plates on the motor vehicles belonging to the bankrupt estate. He tendered all of the fees due, but not the penalties. The Department refused to issue the licenses unless the fees were accompanied with the penalties.

Thereafter the Trustee, by petition, secured an order from the Referee in Bankruptcy to compel the respondents herein to show cause why the penalties should not be set aside; why the 1937 license plates should not be issued on the payment of the fees, exclusive of the penalties; why the respondents should not be required to immediately file such claims as they asserted to the bankrupt estate or be forever barred; and, why the Trustee should not be authorized to sell the motor vehicles free and clear of any and all liens claimed by the Motor Vehicle Department upon said vehicles. Following a hearing, the Referee made an order setting aside all of the penalties assessed against the motor vehicles and directing the Trustee to sell them free and clear of any and all liens thereon. The order further commanded the respondents Ingels and Deems to file claims in bankruptcy for the registration and license fees upon said



motor vehicles within thirty days from the date of the order or be forever barred. A petition to the District Court to review said order was denied and the order of the Referee was confirmed.

The Trustee had also petitioned the Referee for an order directing the respondents to accept the principal of the license fees in full payment of any and all sums owing by the bankrupt estate on said motor vehicles and enjoining collection or attempted collection by them of any penalties under the California statutes. The Referee declined to include such mandate in his order and an application was made by the Trustee to the District Court for a mandatory injunction to such effect. The District Court issued such an order. Appeal was allowed the respondents from each order, the former culminating in case No. 8711 in the Circuit Court of Appeals for the Ninth Circuit and the latter being case No. 8761 in said Circuit Court. Since both cases involved identical facts, they were consolidated for briefing and hearing and were disposed of in one opinion by the Circuit Court.

The Circuit Court of Appeals for the Ninth Circuit reversed the order of the District Court in each case with directions to order the registration and license fees and accrued penalties paid, or, in the alternative, to permit the vehicles to be disposed of, subject to a lien of the State of California for the unpaid taxes and penalties. The Circuit Court held that because the taxes were not due and payable at the time of the filing of the petition they were not "provable" debts and therefore unaffected by the pro-

hibitions of section 57j of the Bankruptcy Act (11 U. S. C. A., Sec. 93 (j)). The Court further held that by virtue of the Act of June 18, 1934 (48 Stats. 993, 28 U. S. C. A., Sec. 124(a)), the Trustee in Bankruptcy is subjected to the penalties and lien of the State of California.

In reaching its conclusion, the Court was confronted with the decision to the contrary of the Circuit Court of Appeals for the Seventh Circuit, to wit, the case of *In re Messenger's Merchants Lunch Rooms, Inc.*, 85 Fed. (2d) 1002. The Honorable Ninth Circuit Court declared:

"In so far as the decision *In re Messenger's Merchants Lunch Rooms, Inc.* (C. C. A. 7), 85 Fed. (2nd) 1002, cited by the appellee as authority for affirmance, is in conflict herewith, it is expressly disapproved."

It is in consequence of said judgment and act of the Circuit Court of Appeals of the Ninth Circuit that your petitioner seeks review by *certiorari* in this Honorable Court to determine the liability of a bankrupt estate to tax penalties which accrue as a result of operations of the Trustee during the pendency of the bankrupt estate.

## Reasons Relied Upon for Allowance of the Writ.

It is respectfully submitted by your petitioner and relied upon as reasons for the granting of the writ that:

(a) The act of the Circuit Court of Appeals for the Ninth Circuit in holding that the bankrupt estate is liable for penalties accruing during the pendency of the bankruptcy is contrary to Section 57j of the Bankruptcy Act and defeats the purpose and scope of the Bankruptcy Act as defined by Congress.

(b) That the act of the Circuit Court of Appeals for the Ninth Circuit is of peculiar public interest and presents a fundamental question of law upon which there should be no diversity of opinion in the several Circuit Courts of Appeal. That the decision of the Circuit Court of Appeals for the Ninth Circuit is in direct conflict with the Circuit Court of Appeals for the Seventh Circuit, in the case of *In re Messenger's Merchants Lunch Rooms, Inc.*, -85 Fed. (2d) 1002, and with the Circuit Court of Appeals for the Third Circuit in the case of *New Jersey v. Pressed Steel Car Co.*, 100 Fed. (2d) 147. That the uncertainty created by the conflict in the Circuit Courts adversely affects the expeditious administration and closing of innumerable pending bankruptcy cases and will continue to so affect such cases and future bankruptcy cases until and unless this Court shall exercise its power of supervision and hear and determine the present question.

Wherefor, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, directing that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the cases numbered and entitled on its docket: "No. 8711, Ray Ingels, Director of Motor Vehicles of the State of California, Howard E. Deems, as Registrar of Motor Vehicles of the State of California, and the Motor Vehicle Department of the State of California, Appellants, vs: L. Boteler, Trustee of the Estate of Richmaid Creameries, Inc., a corporation, Debtor, Appellee," and "No. 8761, Ray Ingels, Director of Motor Vehicles of the State of California, and Howard E. Deems, as Registrar of Motor Vehicles of the State of California, Appellants, vs. L. Boteler, Trustee of Richmaid Creameries, Inc., a corporation, Appellee," and that the judgment of said Court be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

March, 1938.

THOMAS S. TOBIN,

*Counsel for Petitioner.*

DAVID SCHWARTZ,  
RAPHAEL DECHTER,  
JOSEPH J. RIFKIND,

*Of Counsel for Petitioner.*

IN THE  
**SUPREME COURT**  
OF THE  
**UNITED STATES.**

---

OCTOBER TERM, 1938.

---

No. ....

L. BOTELER, Trustee of the Estate of RICHMAID CREAM-  
ERIES, INC., a corporation, Debtor,

*Petitioner,*

*vs.*

RAY INGELS, Director of Motor Vehicles of the State of  
California; HOWARD E. DEEMS, as Registrar of Motor  
Vehicles of the State of California, and the MOTOR VE-  
HICLE DEPARTMENT OF THE STATE OF CALIFORNIA,

*Respondents.*

---

No. ....

L. BOTELER, Trustee of RICHMAID CREAMERIES, INC., a  
corporation, Debtor,

*Petitioner,*

*vs.*

RAY INGELS, Director of Motor Vehicles of the State of  
California, and HOWARD E. DEEMS as Registrar of Mo-  
tor Vehicles of the State of California,

*Respondents.*

---

**BRIEF IN SUPPORT OF PETITION FOR WRIT  
OF CERTIORARI TO THE UNITED STATES  
CIRCUIT COURT OF APPEALS FOR THE  
NINTH CIRCUIT.**



### **Opinion Below.**

No opinion was written by the District Court. The opinion in the United States Circuit Court of Appeals for the Ninth Circuit was filed December 15, 1938, and is reported in 100 Fed. (2d) 915.

### **Jurisdiction.**

The judgment of the Circuit Court of Appeals was filed on December 15, 1938. No petition for rehearing in that Court was filed. This petition for Writ of Certiorari is filed within three months after the filing of the judgment of the Circuit Court of Appeals for the Ninth Circuit.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, 28 U. S. C. A. 347.

### **Statement of the Case.**

The essential facts of the cases herein are stated in the accompanying petition for Writ of Certiorari and in the interest of brevity are not repeated herein.

### **Specification of Errors.**

The Circuit Court of Appeals erred in each of the following particulars:

1. In holding that Section 57j of the Bankruptcy Act is not applicable to penalties which accrue during the course of the administration of a bankrupt estate, while the estate is being operated incidental to its liquidation.

2. In holding that the State of California has a lien on the property of the bankrupt estate which lien accrued during the course of administration of the bankruptcy estate.

3. In holding that the Act of June 18, 1934 (48 Stat. 993, 28 U. S. C. A., Sec. 124 (a)) subjects the Trustee in Bankruptcy to liability for penalties attached to State taxes.

4. In holding that both the District Court and the Referee in Bankruptcy erred in finding that the Trustee had no funds with which to pay the motor vehicle taxes.

### **Argument and Authorities in Support of Petition.**

We first quote at this point the relevant portions of the applicable statutes involved in this case:

*Section 3 of the California Vehicle License Fee Act*, as amended by Chapter 6 of California Statutes of 1937:

"Except as hereinafter provided, the license fee hereby imposed shall be due and payable to the department on the first day of January of each year. Such fee shall be paid to the department at the time of registration or renewal of registration of such vehicle." (Chap. 362, Cal. Stats. 1935 as amended by Chap. 6, Cal. Stats. 1937, p. 62.)

*Section 6 of the California Vehicle License Fee Act* (*ibid.*):

"Whenever any vehicle is operated upon any highway of this State without the license fee having first been paid as required by this act, such fee is delinquent. If such fee is not paid within thirty days after the same becomes delinquent, a penalty equal to one-half such fee shall be added thereto and collected therewith. If, however, the annual registration of a vehicle is being renewed, such penalty shall be added to any payment made on or after February 5, unless the vehicle has not been operated on the highways since the expiration of the prior registration."

*Section 378 of the California Vehicle Code:*

"When Fees Delinquent. Penalties. (a) Whenever any vehicle is operated upon any highway of this State without the registration fee having first been paid as required by this code, such fee is delinquent.

(b) A penalty shall be added upon any application for annual renewal of registration made on or after February 5 unless the vehicle has not been operated on the highways since the expiration date.

(c) Except as otherwise provided in subdivision (b), if any fee is not paid within thirty days after the same becomes delinquent a penalty shall be added thereto.

(d) In every event the penalty shall be equal to the fee and shall be collected therewith."

*Section 379(a) of the California Vehicle Code:*

"Every registration or transfer fee and any penalty added thereto, from the date the same became due, constitute a lien upon the vehicle for which due."

*Section 57j of the Bankruptcy Act:*

"Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law." (11 U. S. C. A., Sec. 93(j)).

*Act of Congress, June 18, 1934:*

"Any \* \* \* trustee \* \* \* appointed by any United States Court who is authorized by said court to conduct any business, or who does conduct any business, shall \* \* \* be subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation \* \* \*." (48 Stat. 993, 28 U.S.C. A., Sec. 124(a)).

It is not denied that the Vehicle License Fee Act of the State of California imposes a penalty for non-payment of the motor vehicle licenses, nor is it denied that were this not a bankruptcy proceeding the penalties would have accrued. It is the position of the petitioner, however, that Section 57j of the Bankruptcy Act was enacted for the purpose of protecting creditors of a bankrupt estate from being burdened with the payment out of the assets of the bankrupt estate of such claims which do not represent anything other than the imposition of a penalty. The equitable reasons behind such a rule are obvious. Creditors of a bankrupt estate find themselves seeking salvage out of the assets of an insolvent debtor. It is only fair that such assets as represent the salvage of the bankrupt's property should be applied to the payment of such claims that have a substantial basis, rather than those which owe their existence to the punitive power of a governmental body which is exacted for the purpose of compelling the payment of taxes or other obligations. That this is the intention of Congress can be read from the limitation in Section 57j, which provides that the penalties are not allowable, except in so far as they represent "reasonable and actual costs occasioned" by the delinquencies.

The decision of the Circuit Court in the instant case appears to be the first case in which any of the United States Courts have limited the term "debts" as specifically used in Section 57j of the Bankruptcy Act to "provable" claims. As an example of the fact that no such distinction has heretofore been made, the Circuit Court of Appeals for the Third Circuit in the case of *New Jersey v. Pressed Steel Car Co.*, 100 Fed. (2d) 147, was confronted with a question involving franchise taxes owing to the State of New Jersey for a period of three years. The first of the three years involved taxes prior to an equity receivership, the second year involved franchise taxes during the equity receivership, and the third year involved franchise taxes for the period after a petition under Section 77B of the Bankruptcy Act was filed and the taxpayer was undergoing reorganization under such section. It is most significant to note that although penalties were sought for each of the three years, that in denying such penalties, the Honorable Circuit Court of Appeals for the Third Circuit did not make any distinction and declared that Section 57j of the Bankruptcy Act barred the recovery as to the penalties, in each of the three years.

Nor did the Honorable Seventh Circuit Court of Appeals invoke the limitation of the Ninth Circuit Court of Appeals in this case when the Honorable Seventh Circuit Court determined the case of *In re Messenger's Merchants Lunch Rooms, Inc.*, 85 Fed. (2d) 1002. In that case the facts revealed that the taxes out of which the penalties grew accrued during the course of the administration of the bankruptcy estate. The Honorable Seventh Circuit Court of Appeals looked directly to the intention of Congress in enacting Section 57j of the Bankruptcy



Act and consistent to the purpose of Congress held that the penalties could not be recovered.

The interpretation of laws are effected by the construction given to them over a period of years. The fact that no courts, with the exception of the Ninth Circuit, in the instant case, have yet placed any such limitation on Section 57j from its enactment in 1898 to date, makes it apparent that no such limited and technical construction as has been given to such section by the Honorable Ninth Circuit Court should be permitted to stand.

The reason for relieving a bankrupt estate from penalties is not affected by the question of whether or not the penalty accrued before or after the bankruptcy took place. In either event the Trustee in Bankruptcy is holding the property for the benefit of creditors and in either event the same strong considerations to safeguard the corpus of the property from unreasonable charges exists.

Nor does the Act of June 18, 1934 alter the result. This Act merely provides that the Trustee will be subjected to the same taxes as if the property he is operating were operated by an individual or a corporation. Had Congress intended by virtue of this section thus to repeal or limit Section 57j of the Bankruptcy Act, it would have been a simple matter to have included therein the provision that such a Trustee would be liable also to penalties. Taxes and penalties are in different categories. The tax consists of a payment for a privilege to a governmental body. The penalty, on the other hand, constitutes a punitive method of collection by a taxing body. The significant omission of penalties from the Act of 1934 should make it apparent that Congress did not intend to affect the prohibition of Section 57j against the allowability of penalties.

In effect the decision of the Honorable Ninth Circuit Court is that Section 57j of the Bankruptcy Act has been impliedly repealed by the Act of June 18, 1934 in so far as penalties accruing during bankruptcy administration is concerned. Such holding violates the long established doctrine of this Honorable Court that repeals by implication are not to be favored.

The subject matter of this petition is of great importance because it affects the administration of innumerable bankruptcy estates. If the conflict between the Ninth Circuit Court of Appeals on the one hand and the Seventh and Third Circuits on the other hand continues to exist, the expeditious closing of many bankruptcy estates will be forestalled by the uncertainty created thereby. It is likely that many penalties will be unlawfully collected on the strength of the decision of the Ninth Circuit, for the reason that penalties assessed, although of substantial importance to the creditors, may nevertheless be too small to permit litigation and the loss of time incidental thereto, which will be occasioned by the conflict between the Circuit Courts. This Honorable Court has not as yet had the occasion to construe Section 57j of the Bankruptcy Act in so far as it is applicable to the operations of the Trustee in Bankruptcy of a bankrupt estate. We respectfully pray that this Honorable Court take jurisdiction in the premises herein.

March 9, 1939.

THOMAS S. TOBIN,  
*Counsel for Petitioner.*

DAVID SCHWARTZ,  
RAPHAEL DECHTER,  
JOSEPH J. RIFKIND,  
*Of Counsel.*





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IN THE  
**SUPREME COURT**  
OF THE  
**UNITED STATES.**

October Term, 1939.

No. 15.

BOTELER, Trustee of the Estate of RICHMAID CREAM-  
ERIES, INC., a corporation, Debtor.

*Petitioner,*

vs.

RAY INGELS, Director of Motor Vehicles of the State of  
California; HOWARD E. DEEMS, as Registrar of Motor  
Vehicles of the State of California, and the MOTOR  
VEHICLE DEPARTMENT OF THE STATE OF CALIFORNIA,

*Respondents.*

No. 16.

BOTELER, Trustee of RICHMAID CREAMERIES, INC., a  
corporation, Debtor,

*Petitioner,*

vs.

RAY INGELS, Director of Motor Vehicles of the State of  
California, and HOWARD E. DEEMS, as Registrar of  
Motor Vehicles of the State of California,

*Respondents.*

**PETITIONER'S OPENING BRIEF.**

THOMAS S. TOBIN,

*Counsel for Petitioner.*

633 Subway Terminal Building,  
Los Angeles, California.

RAFAEL DECHTER,

DAVID SCHWARTZ,

SEPH J. RIFKIND,





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L. BOTELER, Trustee of the Estate of RICHMAID CREAM-  
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RAY INGELS, Director of Motor Vehicles of the State of  
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Motor Vehicles of the State of California,

*Respondents.*

---

**PETITIONER'S OPENING BRIEF.**

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## OPINION BELOW.

No opinion was written by the District Court. The opinion of the United States Circuit Court of Appeals for the Ninth Circuit was filed December 15, 1938, and is reported in 100 Fed. (2d) 915.

## JURISDICTION.

By stipulation of counsel and order of the United States Circuit Court of Appeals for the Ninth Circuit, the above-numbered appeals, in which separate transcripts of records have heretofore been filed, were consolidated. Accordingly one opinion was rendered by the Circuit Court for the two cases. For purposes of convenience, the transcript of the record in case No. 15 will be referred to as R. I, and the transcript of record in case No. 16 will be referred to as R. II.

Jurisdiction of this Court is invoked under the writ of certiorari granted by it in the above-entitled cases on the 24th day of April, 1939. *Section 240, Judicial Code, 28 U. S. C. A. 347.*

## STATEMENT OF THE CASE.

Briefly stated, the facts involved in these cases are as follows:

Richmaid Creameries, Inc., was engaged in the creamery business and owned certain milk and ice cream routes, operating twenty-seven automobiles and trucks in the course of such business [R. II, 5]. Under date of September 16, 1936, it filed its petition under Section 77B of the Bankruptcy Act [R. II, 5]. A temporary Trustee was appointed [R. II, 5]. Thereafter and on December 22, 1936, the District Court, finding that the operations

of the temporary Trustee resulted only in loss, entered its order of liquidation and referred the case to the Referee in Bankruptcy [R. II, 6]. On January 20, 1937, L. Boteler was appointed Trustee in Bankruptcy for the purpose of liquidating the assets of Richmaid Creameries, Inc. [R. II, 6]. Inasmuch as the assets were of little value in liquidation unless deliveries on the milk and ice cream routes were maintained, the Trustee continued to operate the business until February 28, 1937, when the Referee in Bankruptcy approved a sale of the routes and certain equipment [R. I, 67; R. II, 6, 7]. In order to keep operating, upon a number of occasions, the Trustee was compelled to advance his own personal funds to the estate so that there would be no cessation in the making of deliveries [R. II, 7].

The California motor vehicle license fees become due on January 1st of each year. If such fee is not paid within thirty days a penalty designated by statute attaches. The penalty is added to the fee on all applications for renewals and transfers on and after February 5. The California statute further provides that the fees and penalties constitute a lien on the vehicle from which such fee and penalty is due from the time the same becomes due.

On January 1, 1937, and between January 1, 1937 and February 27, 1937, the Trustee did not have sufficient funds on the estate with which to pay the California motor vehicles license fees on the twenty-seven automobiles and trucks owned by the estate [R. I, 70].

On or about February 27, 1937, the Trustee applied to the Department of Motor Vehicles of the State of California for 1937 license plates on the motor vehicles belong-

ing to the bankrupt estate [R. II, 8]. He tendered all of the fees due, but not the penalties [R. II, 8]. The department refused to issue the licenses unless the fees were accompanied with the penalties [R. II, 8].

Thereafter the Trustee, by petition, secured an order and an amended order from the Referee in Bankruptcy to compel respondents herein to show cause why the penalties should not be set aside; why the 1937 license plates should not be issued on the payment of the fees, exclusive of the penalties; why the respondents should not be required to immediately file such claims as they asserted to the bankrupt estate or be forever barred; and why the Trustee should not be authorized to sell the motor vehicles free and clear of any and all liens claimed by the Motor Vehicle Department upon said vehicles [R. I, 10, 17-18]. Following a hearing, the Referee made an order setting aside all of the penalties assessed against the motor vehicles and directing the Trustee to sell them free and clear of any and all liens thereon [R. I, 43, 44]. The order further commanded the respondents Ingels and Deems to file claims in bankruptcy for the registration and license fees upon said motor vehicles within thirty days from the date of the order or be forever barred [R. I, 44]. A petition to the District Court to review said order was denied and the order of the Referee was confirmed [R. I, 61].

The Trustee had also petitioned the Referee for an order directing the respondents to accept the principal

of the license fees in full payment of any and all sums owing by the bankrupt estate on said motor vehicles and enjoining collection or attempted collection by them of any penalties under the California statutes [R. I, 15]. The Referee declined to include such mandate in his order and an application was made by the Trustee to the District Court for a mandatory injunction to such effect [R. II, 9-15]. The District Court issued such an order [R. II, 15-17]. Appeal was allowed the respondents from each order, the former culminating in case No. 8711 in the Circuit Court of Appeals for the Ninth Circuit and the latter being case No. 8761 in said Circuit Court [R. I, 103-104; R. II, 33-34]. Since both cases involved identical facts, they were consolidated for briefing and hearing and were disposed of in one opinion by the Circuit Court.

The Circuit Court of Appeals for the Ninth Circuit reversed the order of the District Court in each case, with directions to order the registration and license fees and accrued penalties paid, or, in the alternative, to permit the vehicles to be disposed of, subject to a lien of the State of California for the unpaid taxes and penalties [R. I, 144-145; R. II, 57-58]. The Circuit Court held that because the taxes were not due and payable at the time of the filing of the petition they were not "provable" debts and therefore unaffected by the prohibitions of Section 57j of the Bankruptcy Act (11 U. S. C. A., Sec. 93(j)) [R. I, 137-140]. The Court further held that, by virtue of the Act of June 18, 1934 (48 Stats. 993; 28 U. S. C. A.,



Sec. 124(a)), the Trustee in Bankruptcy is subjected to the penalties and lien of the State of California [R. I, 141].

In reaching its conclusion the Court was confronted with the decision to the contrary of the Circuit Court of Appeals for the Seventh Circuit, to-wit, the case of *In re Messenger's Merchants Lunch Rooms, Inc.*, 85 Fed. (2d) 1002 [R. I, 144]. The Honorable Ninth Circuit Court declared:

"In so far as the decision *In re Messenger's Merchants Lunch Rooms, Inc.* (C. C. A. 7), 85 Fed. (2d) 1002, cited by the appellee as authority for affirmance, is in conflict herewith, it is expressly disapproved."

A writ of certiorari was granted by this Honorable Court on April 24th, 1939.

### SPECIFICATIONS OF ERROR.

The Circuit Court of Appeals erred in each of the following particulars:

1. In holding that Section 57j of the Bankruptcy Act is not applicable to penalties which accrue during the course of the administration of a bankrupt estate, while the estate is being operated incidental to its liquidation.

2. In holding that the State of California has a lien on the property of the bankrupt estate, which lien accrued during the course of administration of the bankruptcy estate.

3. In holding that the Act of June 18, 1934 (48 Stat. 993, 28 U. S. C. A., Sec. 124(a)), subjects the Trustee in Bankruptcy to liability for penalties attached to state taxes.

4. In holding that both the District Court and the Referee in Bankruptcy erred in finding that the Trustee had no funds with which to pay the motor vehicle taxes.

### SUMMARY OF ARGUMENT.

(1) Section 57j of the Bankruptcy Act relieves trustees in bankruptcy from any liability on account of penalties incorporated into state taxing statutes.

(2) Section 57j of the Bankruptcy Act is not limited in its application to taxes which accrued prior to bankruptcy; but applies equally as well when taxes are accrued by the bankruptcy estate during the operations of a trustee in bankruptcy.

(3) The Act of Congress of June 18, 1934, does not subject trustees in bankruptcy to state taxing penalties.

(4) The Act of Congress of June 18, 1934, does not operate to repeal Section 57j of the Bankruptcy Act.

(5) The Circuit Court of Appeals erred in refusing to accept the findings of fact concurred in both by the District Court and the Referee in Bankruptcy to the effect that at the time the taxes accrued in the cause herein the Trustee did not have funds with which to pay such taxes, and that the Trustee was not negligent in his failure to pay the taxes at the time that they accrued.

## ARGUMENT.

### (1) Section 57j of the Bankruptcy Act Relieves Trustees in Bankruptcy From Any Liability on Account of Penalties Incorporated Into State Taxing Statutes.

It is appropriate to first quote the relevant portions of the applicable statutes involved in this case.

Section 3 of the California Vehicle License Fee Act, as amended by Chapter 6 of California Statutes of 1937:

"Except as hereinafter provided, the license fee hereby imposed shall be due and payable to the department on the first day of January of each year. Such fee shall be paid to the department at the time of registration or renewal of registration of such vehicle." (Chap. 362, Cal. Stats. 1935, as amended by Chap. 6, Cal. Stats. 1937, p. 62.)

Section 6 of the California Vehicle License Fee Act (*ibid.*):

"Whenever any vehicle is operated upon any highway of this state without the license fee having first been paid as required by this act, such fee is delinquent. If such fee is not paid within thirty days after the same becomes delinquent, a penalty equal to one-half such fee shall be added thereto and collected therewith. If, however, the annual registration of a vehicle is being renewed, such penalty shall be added to any payment made on or after February 5, unless the vehicle has not been operated on the highways since the expiration of the prior registration.

"\* \* \* Every license fee and any penalty added thereto, from the date the same becomes due, constitutes a lien upon the vehicle for which due."

Section 378 of the California Vehicle Code:

"When Fees Delinquent. Penalties.

(a) Whenever any vehicle is operated upon any highway of this state without the registration fee having first been paid as required by this code, such fee is delinquent.

(b) A penalty shall be added upon any application for annual renewal of registration made on or after February 5, unless the vehicle has not been operated on the highways since the expiration date.

(c) Except as otherwise provided in subdivision (b), if any fee is not paid within thirty days after the same becomes delinquent a penalty shall be added thereto.

(d) In every event the penalty shall be equal to the fee and shall be collected therewith."

Section 379(a) of the California Vehicle Code:

"Every registration or transfer fee and any penalty added thereto, from the date the same became due, constitute a lien upon the vehicle for which due."

Section 57j of the Bankruptcy Act:

"Debts owing to the United States, a state, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law." (11 U. S. C. A., Sec. 93(j).)

Act of Congress, June 18, 1934:

"Any \* \* \* trustee \* \* \* appointed by any United States Court who is authorized by said

court to conduct any business, or who does conduct any business, shall \* \* \* be subject to all state and local taxes applicable to such business the same as if such business were conducted by an individual or corporation \* \* \* " (48 Stat. 993, 28 U. S. C. A., Sec. 124(a)).

In conformity with Section 57j of the Bankruptcy Act, it has been uniformly held that penalties on debts due to a State are not recoverable. *In re York Silk Mfg. Co.*, 188 Fed. 735, affirmed *Pennsylvania v. York Silk Mfg. Co.*, 192 Fed. 81, appeal dismissed 34 Supreme Court 601, 231 U. S. 718, 58 L. Ed. 813 and certiorari denied 34 Supreme Court 602, 232 U. S. 724, 58 L. Ed. 815. In that case the District Court, at page 739, Vol. 188 Federal Reporter, said:

"It will thus be seen that under these circumstances penalties are not even provable in bankruptcy, and can only be allowed for the amount of the pecuniary loss sustained by the act, transaction or proceeding out of which the penalty or forfeiture arose, with reasonable and actual cost occasioned thereby, and such interest as may have accrued thereon according to law. \* \* \* These penalties must therefore be disallowed entirely, but without prejudice to the State to make a claim as provided for in the above section."

In *People v. Jersawit*, 44 S. Ct. 127, 263 U. S. 493, 68 L. Ed. 405, the Supreme Court disallowed a claim for a penalty, stating on page 407:

1. "There can be no doubt that the additional 10% charged for failure to pay by January 1st is a penalty disallowed by the Bankruptcy Act, Sec. 57j (Comp. St., Sec. 9641) \* \* \*"



In *United States v. Birmingham Trust Co.*, 258 Fed. 562, the court, at page 564 said:

"Under the provisions of this section (Sec. 57j), it seems clear the right of the United States to claim the penalty or forfeiture is denied except as to the actual pecuniary loss suffered by the United States.

\* \* \* As there is no question or suggestion that in the matter of this penalty the United States suffered any pecuniary loss, it cannot be allowed."  
(Matter in parentheses ours.)

**(2) Section 57j of the Bankruptcy Act Is Not Limited in Its Application to Taxes Which Accrued Prior to Bankruptcy; but Applies Equally as Well When Taxes Are Accrued by the Bankruptcy Estate During the Operations of a Trustee in Bankruptcy.**

The Circuit Court of Appeals in its opinion in the instant case held that Section 57j of the Bankruptcy Act is applicable only to debts or claims which are provable in bankruptcy. The Circuit Court held that because the tax accrued subsequent to the filing of the petition in bankruptcy, that the tax was not a provable claim or provable debt within the meaning of the Bankruptcy Act and therefore was not subject to the prohibition of Section 57j of the Bankruptcy Act. In this reasoning the Circuit Court of Appeals for the Ninth Circuit has seen fit to restrict the term "debt" to that of a provable claim in bankruptcy. Section 57 of the Bankruptcy Act (U. S. Code, Title 11, Chap. 6, Sec. 93) deals with the proof and allowance of claims in bankruptcy. It is of particular importance that throughout the section Congress repeatedly used the term "claims" and in only one instance did Congress use the

term "debts". The term "debts" is exclusively used in subdivision *j* of Section 57 which refers to indebtednesses owing to the United States, a State, a county, a district, or a municipality. To give significance to the fact that the term "claim" is used in all other instances within Section 57 which have reference to the proof and allowance of claims in bankruptcy, but utilizes a different term, to-wit, "debts" with reference to penalties or forfeitures in connection with governmental agencies, it may reasonably be inferred that Congress was not confining the scope of the Act to mere provable "claims" in bankruptcy, but that it used the term "debts" so as to embrace indebtednesses other than provable "claims". While it may be admitted that had Congress used the term "claims" in connection with subdivision *j* of Section 57 of the Bankruptcy Act, that it might possibly be inferred therefrom that only provable claims such as arose previous to the filing of the petition in bankruptcy only were included; the fact that a broader designation was used indicates the intent of Congress to prohibit the collection of penalties on taxes whether accrued previous to the filing of a petition in bankruptcy or subsequent to the filing of the petition in bankruptcy.

The purpose of Congress in enacting Section 57*j* of the Bankruptcy Act is apparent from its face. This section prohibits the allowance of penalties or forfeitures except for the amount of the pecuniary loss sustained by the act out of which the penalty arose. This is a recognition of the fact that the creditors for whom the bankruptcy estate is being administered should not suffer any depreciation from their recovery of the bankruptcy estate, on account of tax claims other than those which represent actual taxes incurred or actual loss accruing to the taxing body.

"The purpose of subsection j is clear. The creditors are not to be mulcted 'except to the amount of the pecuniary loss sustained,' interest and costs, because of debts owing the sovereign as a penalty or forfeiture." *Gilbert's Collier on Bankruptcy*, 4th Edition, Section 1064, page 783.

"In many branches of bankruptcy law, the legal principles established are very different from those which govern solvent persons and corporations. The rules of set-off and of priority can be mentioned as only two out of many examples. In enacting section 57j, Congress was no doubt motivated by the fact that it was dealing with insolvent persons and corporations, unable to meet their obligations, and that any tax penalty collected would punish not the insolvent, but his creditors. Congress doubtless also recognized that the other purpose of a penalty—to induce the individual subject to a tax to pay it promptly—is inapplicable where he is unable to do so. Consequently, in dealing with tax claims in bankruptcy proceedings, Congress has said in effect: 'All ordinary taxes are to be paid ahead of general claims, but the estate should not bear the burden of unusual and extraordinary exactions imposed for reasons which have no application in bankruptcy proceedings.' " *In re Standard Composition Co.*, 23 Fed. Supp. 391, 395.

The Circuit Court below recognized the fact that had the penalty herein arisen prior to the filing of the petition in bankruptcy that Section 57j would bar the recovery of such penalty. It asserts, however, that a different rule is applicable because of the fact that the penalty accrued during the administration of the bankruptcy estate by the trustee in bankruptcy. We respectfully submit that the basis for such a conclusion by the Honorable Circuit

Court below is purely a technical one and unsustained by legislative intent. In substance, there is no reason why the rule should be different in cases where the penalty arises during the operations of the bankruptcy estate by a trustee in bankruptcy from those cases where the penalty accrued prior to bankruptcy. In either event, the purpose of Congress was to avoid the distribution of a bankruptcy estate in such a way as to compensate creditors and claimants for any amount other than actually represented substantial and meritorious considerations. It was intended that creditors should not be made to suffer any diminutions of their recovery of the assets of a bankrupt estate because of punitive provisions in taxing statutes.

A penalty is not a tax.

In the case of *In re York Silk Mfg. Co.*, 188 Fed. 735, the Court, at page 739, said:

"It is perfectly manifest that they (penalties) are not taxes within the meaning of the law; \* \* \*"  
(Matter in parentheses ours.)

Note the definition of penalty in 25 *Corpus Juris* 1178. Section 72, wherein it is stated:

"A penalty is a sum of money of which the law exacts payment by way of punishment for doing some act that is prohibited or omitting to do some act that is required to be done."

In *Featherstone v. The People*, 194 Ill. 325, at page 334, the Court said:

"Punishment is synonymous with penalty."

A penalty, therefore, is no part of the tax. It is a means of punishment and is utilized for the purpose of

compelling the payment of taxes. However, by the enactment of Section 57j, Congress saw fit to relieve bankruptcy estates from the necessity of the payment of penalties. The reasons which render it undesirable to permit the collection of penalties from the bankrupt estate are no different than cases wherein the tax accrues before or after the filing of the petition in bankruptcy. The technical ground upon which the Honorable Circuit Court of Appeals for the Ninth Circuit rested its decision, to-wit, that the use of the term "debt" should be defined as "provable claim" in bankruptcy, is neither warranted by the language of Section 57j of the Bankruptcy Act or by the congressional intent creating the section.

**(3) The Act of Congress of June 18, 1934, Does Not Subject Trustees in Bankruptcy to State Taxing Penalties.**

In addition to the ground hereinbefore mentioned, the Circuit Court of Appeals for the Ninth Circuit based its decision upon the further ground that the Act of June 18, 1934 (48 Stat. 993, 28 U. S. C. A., Sec. 124(a)), subjects the trustee to all state and local taxes "applicable to such business the same as if such business were conducted by an individual or a corporation". The Circuit Court said:

"This is sufficient basis for the attachment of the penalty and lien."

This very act, however, serves the purpose of revealing that, although Congress intended to subject trustees in bankruptcy to state and local taxes, it did not subject trustees in bankruptcy to penalties. The section refers only to "taxes". Its silence as to "penalties" is therefore

vitaly significant. We have heretofore shown that a penalty is not a tax—it is a means of punishment. Had Congress intended that receivers and trustees be subjected to penalties, the statute would not merely have recited that such receivers and trustees were to be subjected to all applicable state and local taxes. By the use of the word "taxes" Congress apparently meant to exclude receivers and trustees from being subject to "penalties".

"It is insisted, however, that the Act of June 18, 1934, subjecting receivers in bankruptcy to liability for the occupational tax should be so construed as to eliminate the prohibition against recovery of penalties provided in Section 57j. The language of the act does not support this contention. *It applies only to taxes, not to penalties.* We are not justified in extending its purview." (*Italics ours.*)

*In re Messenger's Merchants Lunch Rooms, Inc.,*  
85 Fed. (2d) 1002.

To fully understand the purpose of 28 U. S. C. A., Section 124(a), which was adopted on June 18, 1934, consideration must be given to the status of the tax liability of receivers and trustees in bankruptcy prior to that date.

Prior to the passage of this statute courts had almost uniformly exempted receivers and trustees who operated businesses of bankrupts from the payment of federal, state or local taxes, unless such receivers and trustees were especially within the purview of the particular taxing statute.

The leading case on this proposition is *Reinecke, v. Gardner*, 277 U. S. 239, 48 S. Ct. 472, certified to the Supreme Court from the Circuit Court of Appeals for



the Seventh Circuit. In that case the trustee had conducted the bankrupt's business at a substantial profit. Pursuant to order of court, the trustee paid interest on bonds secured by a trust deed on the bankrupt's property and, when filing an income-tax return, deducted the amount of interest from his gross income. The Commissioner of Internal Revenue disallowed the deduction and filed a claim for the additional income and also for an excess profits tax. One of the questions certified was whether a trustee in bankruptcy operating the business of a bankrupt corporation under order of court was subject to the excess profits tax in a case where the corporation, if itself conducting the business, would have been subject to the tax.

The Court, at page 241, said:

"As under the Bankruptcy Act the entire property of the bankrupt vested in the trustee, the income in question was not the income of the bankrupt corporation, but of the trustee and was subject to income and excess profits tax only if the statutes authorized the assessment of the tax against him. The Revenue Act of 1916, Ch. 463, 39 Stat. 756, and the War Revenue Act of 1917, Ch. 63, 40 Stat. 300, imposed income and excess profits taxes on *individuals, partnerships and corporations, but neither in terms mentioned trustees in bankruptcy as taxable persons.* (Italics ours.) But Section 13(c) of Acts of 1916 required trustees in bankruptcy of corporations subject to the income tax to make returns of net income, and provided that 'any income tax due on the basis of such returns \* \* \* shall be assessed and collected in the same manner as if assessed directly against the corporation'. This section, as appellee concedes, by its terms, extends the tax imposed by Section 10 of the Act of 1916 to income received by

trustees in bankruptcy of corporations. See *United States v. Chicago & Eastern Ill. Ry. Co.*, 298 F. 779.

"In the next year Section 4 of Title I of the Act of 1917 imposed an income tax of 4 per cent 'in addition to the tax imposed' by Section 10 of the Act of 1916 as then amended on the same subjects taxed by section 10, and provided that 'the tax imposed by this section shall be computed, levied, assessed, collected, and paid upon the same incomes and in the same manner as the tax' imposed by Section 10. The respondent was thus subjected to the additional income tax of the later act."

"The case is different with respect to the excess profits tax. That tax was imposed by Title II of the Act of 1917 on corporations, partnerships and individuals engaged in trade or business. The title made no mention of executors, receivers, trustees or persons acting in a fiduciary capacity, and contained no language corresponding to the quoted provision of Title I, Section 4, extending the additional income tax to 'the same incomes' taxed by Section 10 of the Act of 1916. A tax imposed on corporations alone does not extend to a trustee in bankruptcy of a corporation. (Italics ours.) See *United States v. Whitridge*, 231 U. S. 144, 34 S. Ct. 24, 58 L. Ed. 159; *Scott v. Western Pacific Ry. Co.*, 246 F. 545; compare *Smietanka v. First Trust & Savings Bank*, 257 U. S. 602, 42 S. Ct. 223, 66 L. Ed. 39."

And on page 244 it said:

"Various reasons may be urged why Congress may not have intended to extend the excess profits tax to trustees in bankruptcy. But whatever purpose Congress may have had, we think the language of Section 212 falls short of indicating any intention to enlarge the classes of taxpayers mentioned in Title II. The extension of a tax by implication is not

*avored.* (Italics ours.) *United States v. Whitridge*,  
*supra*; *Smietanka v. First Trust & Savings Bank*  
*supra*.

"The Treasury Department itself has held that testamentary trustees and trustees of estates in process of distribution, notwithstanding the administrative provisions of the 1916 Act requiring them to make returns for income tax purposes, are not taxable for excess profits. L. O. 1100, 1-2 C. B. 230; S. M. 2384, III-2 C. B. 330.

\* \* \* \* \*

"The first question is answered 'No'."

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Thus, where the statute imposed a tax upon corporations, partnerships, and *individuals* engaged in business, the Supreme Court refused to extend, by implication, the tax to include trustees in bankruptcy, since no specific mention was made in the statute of trustees in bankruptcy.

In *U. S. v. Whitridge*, 231 U. S. 144, 58 L. Ed. 159, receivers in equity had been appointed by the Court to operate a street railway. Petitions were filed on behalf of the United States for an order on the receivers to make returns of net income for the years 1909 and 1910, as required by the Act of August 5, 1906, 36 Stat. at L., Chap. 6, pp. 11, 112-117. The petitions were denied and the appeal followed. The statute in question, so far as it is pertinent, follows:

"Sec. 38. That every corporation \* \* \* organized for profit and having a capital stock represented by shares \* \* \* organized under the laws of the United States or of any state \* \* \* and engaged in business in any state \* \* \* shall be subject to pay annual and special excise tax with respect to the carrying on or doing business by such corporation \* \* \*"

The Court, at page 140, said:

"A reference to the language of the act is sufficient to show that it does not, in terms impose a tax upon the corporate property or franchise as such, nor upon the income arising from the conduct of business unless it be carried on by the corporation. Nor does it in terms impose any duty upon the receiver of a corporation, or of corporate property with respect to paying tax upon the income arising from the management of the corporate assets, or with respect to making any return of such income.

"And we are unable to perceive that such receivers are within the spirit and purpose of the act any more than they are in its letter. True, they may hold, for the time, all the franchise property of the corporation, excepting its primary franchise of corporate existence. In the present case, the receivers were authorized and required to manage and operate the railroad and to discharge the public obligations of the corporations in this behalf, but they did this as officers of the Court, and subject to the order of the Court; not as officers of the respective corporations, nor, with the advantages that inhere in corporate organization as such."

Here we have an instance where the Court refused to subject receivers in equity to a tax because they were not specifically included within the terms of the statute. It should be noted that the taxes were levied upon the right to carry on a business, though the amount of the tax was computed upon the income.

*In re Flatbush Gum Co., Inc.*, 73 Fed. (2d) 283 (November 5, 1934) (certiorari denied 55 Sup. Ct. 509), the Circuit Court of Appeals, Second Circuit, had for consideration the question of the right of the State of

New York to impose a tax upon the proceeds received by a receiver in bankruptcy from the liquidation of the tangible assets of the bankrupt. The New York State Sales Tax Law imposed a tax upon all persons for the privilege of selling tangible personal property at retail. The statute (Consolidated Laws, Chap. 60, Sec. 390) defined persons as including "an *individual*, partnership, society, association, joint stock company, corporation, and any *combination of individuals*". (Italics ours.) The District Court denied the claim of the state and the Circuit Court of Appeals, in affirming the decision, said, at page 284:

"The statute imposes the duty to make a return and pay the tax upon every 'person' who sells tangible personal property at retail. And in Section 390 of the statute the legislature took care to declare that 'person' meant more than one who acts solely in his capacity as an individual. In so doing it included in the same category with an individual a 'partnership, society, association, joint stock company, corporation and any combination of individuals.' *Its failure to include a receiver in this enumeration was, we think, highly significant, and indicates an intention to permit such sales to be made by a receiver tax free.* Indeed, the tax being laid upon the 'privilege of selling', being imposed upon 'every person' and person being defined as above indicated, it is clear that a taxable sale is but the exercise of the privilege of selling by a person within the statutory definition. *An intention to tax retail sales made by receivers must be indicated by words which may reasonably be accepted to disclose it before courts may construe the statute to mean that for the coverage of taxing acts it is not to be extended by implication.* *Smietanka v. First Trust & Savings Bank*, 257 U. S. 602, 42 S. Ct. 223, 66 L. Ed. 391; *Gould v.*



Gould, 245 U. S. 151, 38 S. Ct. 53, 62 L. Ed. 211. Moreover, the issue here is closely analogous to that presented by the first question considered in *Reinecke v. Gardner*, 277 U. S. 239, 11 Am. B. R. (N. S.) 738, 48 S. Ct. 472, 72 L. Ed. 866. It was there held that the failure of Congress to use language clearly extending the excess profits tax of the 1917 Revenue Act (40 Stat. 300) to 'executors, receivers, trustees or persons acting in a fiduciary capacity' was a failure to tax a trustee in bankruptcy of a corporation who actually carried on the business of the corporation even though the corporation would have been subject to the tax had it been itself conducting its business. *The principle that taxation by implication is not favored controls this appeal and leads us to the conclusion that the statute does not reach the sale made by this receiver.* See *United States v. Whitridge*, 231 U. S. 144, 34 S. Ct. 24, 58 L. Ed. 159; *Scott v. Western Pacific R. Co.* (C. C. A.), 246 F. 545. Affirmed." (All italics ours.)

Subsequently, *In re Browning, King & Co., Inc.*, 79 Fed. (2d) 983 (November 5, 1935), the same Court again had occasion to construe the New York Sales Tax Law when the state appealed from an order denying its claim for taxes based upon sales at retail made in conduct of business by the receivers and trustees in bankruptcy. This case is identical in every respect with the instant case. The Court, in a memorandum *per curiam* decision, said:

"Order affirmed on authority of *In re Flatbush Gum Co.*, 73 Fed. (2d) (C. C. A. 2d)."

In the light of the foregoing decisions one can perceive the obvious purpose of Congress in effecting Section 124, 28 U. S. C. A. This does not embrace, however,



any purpose to subject receivers and trustees in bankruptcy cases to the penalties which the bankruptcy courts have uniformly held to be not a part of the tax, but distinctly different from the tax and not allowable in courts of bankruptcy.

**(4) The Act of Congress of June 18, 1934, Does Not Operate to Repeal Section 57j of the Bankruptcy Act.**

As we have heretofore seen Section 57j of the Bankruptcy Act was enacted by Congress for the purpose of preventing the collection of tax penalties in bankruptcy estates. We have further seen that the Act of Congress of June 18, 1934, which subjected trustees in bankruptcy to state and local taxes did not expressly include penalties. To accept the decision of the Circuit Court that the Act of Congress of June 18, 1934 subjects the trustee in bankruptcy to state tax penalties amounts to a repeal by implication of Section 57j of the Bankruptcy Act, at least in so far as it refers to operations of the trustee in bankruptcy. It is fundamental law that repeals by implication are not to be favored by the courts. This Honorable Court has repeatedly so held.

See:

*General Motors Acceptance Corp. v. United States*,  
286 U. S. 49, 52 S. Ct. 468;

*United States v. Burroughs*, 289 U. S. 159, 53 S.  
Ct. 574;

*United States v. Jackson*, 302 U. S. 628, 58 S. Ct.  
390.

There is no reasonable basis upon which the Honorable Circuit Court below should have thus impliedly repealed Section 57j of the Bankruptcy Act relative to the operations of the trustee in bankruptcy.

- (5) The Circuit Court of Appeals Erred in Refusing to Accept the Findings of Fact Concurred in Both by the District Court and the Referee in Bankruptcy to the Effect That at the Time the Taxes Accrued in the Cause Herein, the Trustee Did Not Have Funds With Which to Pay Such Taxes, and That the Trustee Was Not Negligent in His Failure to Pay the Taxes at the Time That They Accrued.

The Referee in Bankruptcy found as a fact that at the time that the tax accrued in this case the trustee in bankruptcy did not have funds with which to pay the tax [R. I, 41]. The District Court rendered a similar finding [R. II, 24]. These findings were based upon competent evidence. The trustee testified:

"I might say further that it became necessary myself from my own funds to pay cash to employees for a week or two after I got in there because of the inadequate daily receipts to keep the payroll going and buy the necessary requirements. *In other words, the reason for not paying this tax, one reason at least, was the inadequacy of money so to do.*" (Italics ours.) [R. I, 70.]

The Circuit Court below held that these findings were contrary to the true facts. It stated that large sums of money were received by the trustee during this time and were paid out *before* the license fees became subject to penalty.

We respectfully submit that the Honorable Circuit Court below should not have disturbed the findings of fact which were concurred in both by the Referee in Bankruptcy and the District Court. It has been repeatedly held that where both the Referee and the District Court concur in the findings of fact and that the findings are

based upon competent evidence, such facts are to be conclusively presumed.

*Menson v. Williams*, 213 U. S. 453, 29 S. Ct. 519;

*Page v. Rogers*, 211 U. S. 575, 29 S. Ct. 159;

*Brislin v. Killanna*, 85 Fed. (2d) 667;

*Moore v. Lane*, 84 Fed. (2d) 553;

*Ott v. Thurston*, 76 Fed. (2d) 368;

*In re Nathanson Bros. Co.*, 64 Fed. (2d) 912.

The Circuit Court overruled the finding of fact of the Referee and the District Court for the reason that the record reveals that there were receipts and disbursements during the period of time involved, as reflected by the reports of the receiver of receipts and disbursements between September 16, 1936, and January 19, 1937, and the reports of the trustee in bankruptcy of receipts and disbursements between January 20, 1937, and February 4, 1937. The report of the receiver of operations between December 16, 1936, and January 19, 1937, reveals:

"The business was operated on a cash basis during this time, and this accrued payroll and other unpaid bills are outstanding as a result of losses in the operation of the business. \* \* \* The greater part of these claims is for labor \* \* \* [R. I, 75.]

Paragraph VIII of this report reveals as follows:

"There is attached hereto a list of accrued payroll remaining unpaid, to-wit, for services rendered during the temporary and permanent trusteeship of your petitioner. *That your petitioner paid payroll to the limit of his cash ability during his trusteeship*, but the attached Schedule 'B', pages one and two, show the name and amounts due to labor for labor actually

performed during the administration of your trustee, which claims are *preferred labor claims and costs of administration* \* \* \*. That during the course of administration of your trustee he had incurred debts which are *prior debts and costs of administration.*" [R. I, 76, 77.]

Schedule "A", referred to in the receiver's report, shows a loss in operations by the receiver of \$9,641.42 for the period commencing December 16, 1936, and ending January 19, 1937 [R. I, 79-80].

Schedule "B", referred to in the receiver's report, listed thirty-four employees who performed labor within the time mentioned and to whom there had become due the sum of \$4,633.53 [R. I, 80-82].

Schedule "C" lists twenty-eight preferred creditors who became such during the receivership to whom there had become due \$5,665.73 [R. I, 82-83].

As a result of the receivership activities between December 16, 1936, and January 19, 1937, preferred claims accrued in a total amount of \$10,615.52 to a total of approximately one hundred and thirty-five different persons, firms and/or corporations.

The receipts of the trustee from the time of his appointment on January 20, 1937, to the date of the sale of the assets were inadequate to conduct the business and keep up the payroll [R. I, 69]. The report of the receiver and the testimony of the trustee reveal that the funds which came into the hands of the trustee were woefully insufficient to care for operating expenses. We feel that

the record conclusively supports the findings of the Referee in Bankruptcy and the United States District Court that during the course of the trustee's administration he was unable financially to pay the license and registration fees, and he was therefore not negligent in failing to pay such fees at the time that they became due.

Whether the trustee in the case herein was negligent or not, Section 57j would operate to prevent the collection of penalties against the estate. However, we feel that the Circuit Court below misunderstood the record when it came to the conclusion that there were sufficient funds with which the trustee could have paid the license fees involved herein.

The trustee testified that he had to take money out of his own pocket to pay many of the expenses of the estate. This type of conduct is purely a gratuity and certainly not mandatory on the part of a trustee in bankruptcy. However, the decision of the Circuit Court below has the effect of saying that unless the trustee had made payment of the taxes out of his own pocket, the estate should be penalized. It is our opinion that it was the possibility of just this type of situation which motivated the enactment of Section 57j of the Bankruptcy Act. The state should not be in a position to collect any more than the tax which is due and any other expense that it actually incurred. It should not be in a position to exact a large sum of money for purely punitive purposes, especially where, as in this case, there was no means by which the trustee could have paid the tax on time.



## CONCLUSION.

In the determination of this case this Honorable Court is being called upon to construe the effect of Section 57j of the Bankruptcy Act. It is our position that the Circuit Court below erred in applying a harsh and limited construction to said section, which was not within the intent of Congress. The decision of the Circuit Court below makes it possible for taxing authorities to deplete an estate perhaps in its entirety, not only for taxes, but for *punitive measures*, while creditors, who parted with substantial considerations, are left without recompense. That Congress did not intend such inequality is obvious from the very standard which Section 57j maintains.

The decision of the Circuit Court below loses the spirit of the Bankruptcy Act itself. In the case of *In re Standard Composition Co.*, 23 Fed. Supp. 391, the District Judge was passing upon the penalty phases of the Social Security Act. In arriving at his conclusion he made the following pertinent observations:

"The Bankruptcy Act, 11 U. S. C. A., Section 1, *et seq.*, was drafted with the principle that 'equality is equity' in mind, but there has been a tendency in recent years for the typical bankruptcy proceeding to resolve itself into a process in which one preferred party after another slices off a portion of the available assets, with little or none remaining for distribution to general creditors. This process ought not to be extended beyond the clear requirements of the controlling statutes."

In the same spirit we submit that, to do justice to the intent of Congress, the decision of the Circuit Court of Appeals for the Ninth Circuit in this case should be reversed.

Respectfully submitted,

THOMAS S. TOBIN,

*Counsel for Petitioner.*

633 Subway Terminal Building,  
Los Angeles, California.

RAPHAEL DECHTER,

DAVID SCHWARTZ,

JOSEPH J. RIFKIND,

*Of Counsel.*

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# BRIEF FOR THE PETITIONER :



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1939.12.12

CHARLES F. BARR

IN THE  
**SUPREME COURT**  
OF THE  
**UNITED STATES.**

OCTOBER TERM, 1939.

No. 15.

L. BOTELER, Trustee of the Estate of Richmaid Creameries, Inc., a corporation, Debtor,

*Petitioner,*

*vs.*

RAY INGELS, Director of Motor Vehicles of the State of California; HOWARD E. DEEMS, as Registrar of Motor Vehicles of the State of California, and the MOTOR VEHICLE DEPARTMENT OF THE STATE OF CALIFORNIA,

*Respondents.*

No. 16.

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**PETITIONER'S BRIEF IN REPLY TO  
RESPONDENTS' ANSWERING  
BRIEF.**

THOMAS S. TOBIN,

633 Subway Terminal Building, Los Angeles,

*Counsel for Petitioner,*

RAPHAEL DECHTER,

JOSEPH J. RIFKIND,

DAVID SCHWARTZ,

*Of Counsel.*





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**PETITIONER'S BRIEF IN REPLY TO  
RESPONDENTS' ANSWERING  
BRIEF.**



## Petitioner Has Not Waived Any of His Specifications of Error.

In their brief filed in answer to Petitioner's opening brief, the Respondents assert that Petitioner has apparently abandoned his second specification of error (Respondents' Brief in Answer to Petitioners' Opening Brief, p. 10).

Specification of error No. 2 is as follows:

"The Circuit Court of Appeals erred \* \* \* in holding that the State of California has a lien on the property of the bankrupt estate, which lien accrued during the course of administration of the bankruptcy estate."

Petitioner files this reply brief so as to avoid the possible inference that such specification of error No. 2 has been waived. Petitioner by no means waives such specification. It was in the interest of brevity that Petitioner did not undertake to explain that whether or not the State of California had a lien upon the property involved in these cases, depends primarily upon the fundamental question of whether or not there was a valid indebtedness to the State of California. It is the position of the Petitioner herein that the State of California had no lien, for the simple reason that there was no liability for penalties applicable to the Trustee in Bankruptcy under section 57j of the Bankruptcy Act of 1898 as amended. It is elementary that a lien cannot exist without the existence of

an obligation for which it is security. Thus, section 2909 of the *Civil Code* of the State of California provides:

“A lien is to be deemed accessory to the act for the performance of which it is a security, whether any person is bound for such performance or not, and is extinguishable in like manner with any other accessory obligation.”

*Pacific Finance Corp. v. Hendley*, 119 Cal. App. 697, 703:

“In this state, the mortgage is but an incident of the indebtedness, the property is impressed with only a lien for the benefit of the mortgagee, the legal title remaining in the mortgagor. (*Blodgett v. Rheinschild*, 56 Cal. App. 736 (206 Pac. 674).) *There exists no lien without an obligation.* There can be no debt or other obligation to be secured. (17 Cal. Jur. 710.) So, therefore, necessarily when property is mortgaged it is put up as security only. The mortgage has no existence independent of the thing or debt secured by it. (*Estate of Fair*, 128 Cal. 607 (61 Pac. 184).) Therefore, in considering the scope and effect of a mortgage lien, some attention must be given the debt intended to be secured thereby.” (Italics ours.)

It is stipulated in the agreed statement of Case No. 16 that the trustee offered to pay the license fees, but refused to pay any of the penalties added thereto [Tr., No. 16, p. 4]. Nor is it denied in Case No. 15 that the trus-

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tee had tendered the full amount of the license fees, and refused to pay the penalties added thereto. This is evidenced by the testimony of the petitioner that he tendered to the Registrar of Motor Vehicles of the State of California a cashier's check in the amount of \$410.90, which was the amount of the license fees without the penalties [Tr., No. 15, p. 41]. We do not believe that there will be any contradiction by the Respondents to the elementary rule that if a proper tender was made of the full amount of the actual indebtedness which the so-called lien of the State purported to cover, that thereupon the lien would be discharged because of such tender. (17 R. C. L., Section 15, page 606.)

In this connection we do not wish to be understood as in any way conceding that a lien could attach to the property of the bankrupt estate during the period of time within which the property of such bankrupt estate was in *custodia legis* under the supervision of the bankruptcy court. Section 124a of the Act of June 18, 1934 (48 Stats. 993, 28 U. S. C. A. sec. 124a), merely provides that receivers and trustees shall be subject to all state and local taxes. It does not expressly include liens. We do not believe such section broad enough to show any legislative intent to subject property once in *custodia legis* to the operation of subsequent liens. It is quite apparent that to have done so would have made it possible for states by such legislation to cripple the effective administration of bankruptcy estates.

We do not believe that the Act of 1934 shows any intent to depart from the principle established by this Honorable Court as early as the year 1875 in the case of *Morgan v. Campbell*, 22 Wall., 89 U. S. 381, 22 L. Ed. 796, wherein this Honorable Court held that there has been no enactment permitting a lien to attach on property after it has been subjected to the jurisdiction of a court of bankruptcy. In that case the Court held that the object of the Bankruptcy Act of 1867 was to prevent the acquisition of any other liens than such as existed when the petition in bankruptcy was filed, and that any proceeding by which this was attempted was within the condemnation of the law.

On pages 18 to 22 of their answering brief, the Respondents cite cases which they believe sustain the validity of a lien presumably attaching after the property has come within the jurisdiction of a court of bankruptcy. With the exception of *State v. Hisey*, 84 Fed. (2d) 802, the cases cited are cases relative to the imposition of tax liability, and not to the imposition of liens upon property already in *custodia legis*. In the *Hisey* case the Honorable Ninth Circuit involved itself in the same error as it did in this case. No reason has yet been advanced why a state or an individual may subject property which is under the control and supervision of a court of competent jurisdiction to the usual consequences of a lien.

## Respondents' Arguments in General Are Based Upon an Erroneous Hypothesis.

We believe that this case has been amply briefed and we do not desire to burden the court with lengthy additional argument. On the other hand, we deem it appropriate to direct attention to the salient error which permeates throughout Respondents' answering brief. It will be noted that almost all of the cases cited by the Respondents in their brief are equity receivership cases. Respondents appear to believe that these are relevant for the consideration of the question involved in this case. The equity receivership cases lose all meaning, however, when consideration is given to the fact that the exemption from liability to penalties is *peculiar to bankruptcy* and is not available in equity receivership. The exemption from liability to penalties is the result of the operation of *section 57j* of the Bankruptcy Act. Certainly, respondents do not contend that such section is available to equity receiverships. The cases thus cited by Respondents are afieid from the relevant issues herein.

Perhaps this is made more obvious by noting that there are fundamental differences between bankruptcy and equity receiverships. Other than the reorganization and rehabilitation features of *section 77b* and their counterparts in the Chandler Act, bankruptcy essentially deals with *insolvent debtors* and seeks an equitable distribution and liquidation of the assets of the bankrupt. Equity receiverships, however, are not necessarily predicated upon insolvency. Equity receiverships arise where courts find equitable cause for subjecting property to the supervision and management of the court through receivership for various reasons such as mismanagement, preservation and



the like. Inasmuch as in an equity receivership the owner of the property may be far from insolvent and inasmuch as the purpose of such receivership is not necessarily liquidation and distribution, there is no reason to avoid the imposition of penalties for failure to pay taxes. On the other hand, in cases of bankruptcy, the bankruptcy court seeks to make an equitable distribution of what is left of the property of an insolvent debtor. Under such circumstances Congress has provided that the distribution shall be confined to substantial and meritorious claims. Inasmuch as a penalty is a means of punishment rather than evidence of the parting of valuable consideration, Congress has seen fit to provide through section 57j of the Bankruptcy Act that the penalties shall not be allowed in bankruptcy proceedings.

We believe that the purpose of Congress was well stated in the case of *In re Ashland Emery and Corundum Co.*, 229 Fed. 829, where the court, at page 831, said:

"If the charge here in controversy is to be regarded as interest, the trustee ought to pay it. Penalties, however, stand upon a different footing. It cannot be said that a penalty imposed for failure to pay a tax is a part of the original tax, in the sense that interest is. By 'interest' is ordinarily understood a charge for the use of money or damages for the detention of it. A penalty, as applied to cases of this character, means a punishment imposed for failure to make payment on time. Section 64a contains no provision for the payment of penalties; and I do not think it can fairly be construed to include them, especially when, as here, the estate was in the course of administration during the entire period when they accrued. It does not seem just, nor to have been the



intention of Congress, that out of a delay in paying the tax caused by the bankruptcy proceedings the state should make a profit or exact a penalty at the expense, for instance, of workmen employed by the bankrupt."

Respondents contend that section 57j applies only to provable claims of taxes which accrued prior to the filing of a petition in bankruptcy. This contention embodies the essential error of the Honorable Circuit Court of Appeals for the Ninth Circuit in its decision of this case. It is significant that the Bankruptcy Act in no portion thereof provides for the filing of claims in bankruptcy based upon taxes. On the contrary, section 64a of the Bankruptcy Act, dealing with the priority of debts, provides that the court shall order the trustee to pay all of the taxes due and owing by the bankrupt.

"The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality, in the order of priority as set forth in paragraph (b) hereof: Provided, that no order shall be made for the payment of a tax assessed against real estate of a bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court. Upon filing the receipts of the proper public officers for such payments the trustee shall be credited with the amounts thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court."

*United States Code*, Sec. 64; Title 11, Chap. 7,  
Sec. 104.

It was to be anticipated by Congress that taxes would accrue both before and after the filing of the petition in bankruptcy. However, this is the only section providing for the payment of taxes, and consequently the courts have properly construed section 64a of the Bankruptcy Act as applying to both taxes accruing before and after the filing of petitions in bankruptcy.

*In re William F. Fisher & Co.*, 148 Fed. 907, at 912:

"And section 1, 30 Stat. 544 (U. S. Comp. St. 1901, page 3419), declares that the word 'debt' shall include any debt, demand, or claim provable in bankruptcy. Of course, a tax is provable in bankruptcy.

\* \* \* It seems to be the duty of the court to require such payment, even though no claim for the same shall have been presented in the manner or within the time prescribed by the bankruptcy act for the filing of claims. *It is true that section 64 does not, in express words, refer to taxes assessed or becoming due after the institution of bankruptcy proceedings. But it is settled law that the bankrupt's estate is taxable while it is in the hands of the bankrupt's trustees.*"

*In re Ashland Emery & Corundum Co.*, 229 Fed. 829:

"Section 64a contains no provision for the payment of penalties; and I do not think it can fairly be construed to include them especially when, as here, the estate was in the course of administration during the entire period when they accrued."

It has been held that it is unnecessary for a taxing body to file a claim in bankruptcy for taxes, unless required to do so by court order. It has been held to be the duty of

the trustee to search the records for the purpose of paying taxes.

*Stanard v. Dayton*, 220 Fed. 441; 241 U. S. 588, 60 L. Ed. 1190, 36 Sup. Ct. 395.

*In re De Angeles*, 36 Fed. (2d) 218;

*Remington on Bankruptcy*, Vol. 6, Sec. 2808, p. 405.

It follows, therefore, that section 57j was not intended to operate only in the event that a formal claim has been filed in bankruptcy based upon taxes. The existence of the tax itself relegates it to the status of a provable debt in bankruptcy. It also follows that only so much of that tax which represents the tax itself, including interest, and any actual costs or expenses incurred by the taxing authorities because of any delay in its non-payment can be collected from the bankruptcy estate for the reason that section 57j of the Bankruptcy Act provides that "penalties" are not allowable.

The leading case in which this Honorable Court held that the trustee in bankruptcy was subject to taxes which accrued during the administration of the estate is *Swartz v. Hammer*, 194 U. S. 441, 48 L. Ed. 1060, 24 Sup. Ct. 695. It is significant to note that in that case, although the court held that the trustee in bankruptcy was subject to tax accruing during his administration of the bankruptcy estate, there is an express recognition of the fact that the penalties involved had been disallowed by the District Court under section 57j. This case reveals that section 64a of the Bankruptcy Act applies both where the tax accrued prior to bankruptcy and where the tax accrued subsequent to bankruptcy. In either event penalties must be denied under section 57j.

In the case of *New Jersey v. Pressed Steel Car Co.*, 100 Fed. (2d) 147, the taxes accrued during the administration of the estate and penalties were denied because of the operation of section 57j.

There has been no material alteration of subdivision a of section 64 of the Bankruptcy Act of 1898.

We believe the history of the decisions of the federal courts reveal that during the existence of section 64a of the Bankruptcy Act, bankruptcy courts have applied said section to taxes whether they accrued previous or subsequent to the filing of the petition in bankruptcy. We do not believe that the novel distinction created by the decision of the Circuit Court below should now disturb the established practice of applying subdivision a of section 64 of the Bankruptcy Act to cases wherein the tax accrued subsequent as well as prior to the filing of the petition in bankruptcy. In the case of *Missouri v. Ross*, 299 U. S. 72, 81 L. Ed. 46, 57 Sup. Ct. 60, this Honorable Court held that the fact that Congress, in the face of decisions of lower federal courts, extending over a period of nearly thirty years, has permitted the clause pertaining to tax claims as it now appears in paragraph (6) of section 64b to stand without change in its phraseology, although amending section 64 of the Bankruptcy Act in other particulars, is persuasive evidence of the adoption by that body of such judicial construction. The court held that it would hesitate to disturb a construction placed upon such section which had always been unanimously followed by such lower courts for nearly thirty years. What was said in that case may be stated equally as well in the instant case:

Quite obviously, the determination of the question involved in the instant case depends upon the true legislative intent of Congress. An effective means of determining legislative intent may be found in the effect of subsequent legislative enactment. The Legislature is presumed to know both the language employed in former acts and the judicial construction placed upon them; and if in a subsequent statute on the same subject it uses different language in the same connection, the courts must presume that a change of the law was intended.

*Louisville R. R. Co. v. Mottley*, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297;

*Johnson v. United States*, 225 U. S. 405, 32 Sup. Ct. 748, 56 L. Ed. 1142.

The enactment of the Federal Unemployment Tax Act (42 U. S. C. A. 301), and the Federal Insurance Contributions Act (Sec. 1400, I. R. C.), raised the question in the lower courts whether or not withholding the 90% credit because of failure of a bankrupt employer to pay the taxes on time constituted a penalty forbidden by section 57j of the Bankruptcy Act. A conflict of cases in the lower courts on this question now exists.

*In re Standard Composition Co.*, 23 Fed. Supp. 391;

*In re Hy Grade Meat & Grocery Co.*, 26 Fed. Supp. 294;

*In re Illinois Art Industries*, 27 Fed. Supp. 334.



It was appropriate therefore for the 76th Congress at its first session to amend these two Acts for the purpose of definitely establishing the legislative intent. Amendments to both of these Acts were approved on August 10, 1939 (Chap. 666, 1st Session, 76th Congress).

Section 1601 of the Internal Revenue Code (Federal Insurance Contributions Act) was amended (the significant changes being italicised) as follows:

“(1) The taxpayer may, to the extent provided in this subsection and subsection (c), credit against the tax imposed by section 1600 the amount of contributions paid by him into an unemployment fund maintained during the taxable year under the unemployment compensation law of a State which is certified for the taxable year as provided in section 1603.

(2) The credit shall be permitted against the tax for the taxable year only for the amount of contributions paid with respect to such taxable year.

(3) The credit against the tax for any taxable year shall be permitted only for contributions paid on or before the last day upon which the taxpayer is required under section 1604 to file a return for such year; except that credit shall be permitted for contributions paid after such last day but before July 1 next following such last day, but such credit shall not exceed 90 per centum of the amount which would have been allowable as credit on account of such contributions had they been paid on or before such last day. *The preceding provisions of this subdivision shall not apply to the credit against the tax of a taxpayer for any taxable year if such taxpayer's assets, at any time during the period from such last day for filing a return for such year to June 30 next following such last day, both dates inclusive, are in the cus-*



*tody or control of a receiver, trustee, or other fiduciary appointed by, or under the control of, a court of competent jurisdiction.*

(c) *Limit on Total Credits.*—The total credits allowed to a taxpayer under this subchapter shall not exceed 90 per centum of the tax against which such credits are allowable.”

Similarly, section 902 of the Social Security Act was amended (the significant amended portions being italicised) as follows:

“S . 902. (a) Against the tax imposed by section 901 of the Social Security Act for the calendar year 1936, 1937, or 1938, any taxpayer shall be allowed credit for the amount of contributions, with respect to employment during such year, paid by him into an unemployment fund under a State law—

(1) Before the sixtieth day after the date of the enactment of this Act;

(2) On or after such sixtieth day, with respect to wages paid after the fortieth day after such date of enactment;

(3) *Without regard to the date of payment, if the assets of the taxpayer are, at any time during the fifty-nine-day period following such date of enactment, in the custody or control of a receiver, trustee, or other fiduciary appointed by, or under the control of, a court of competent jurisdiction.*

(c) \* \* \* The total credit allowable against the tax imposed by section 901 of such Act for the

calendar years 1936, 1937 and 1938, respectively, shall not exceed 90 per centum of such tax.

(i) *No part of the tax imposed by the Federal Unemployment Tax Act or by title IX of the Social Security Act, whether or not the taxpayer is entitled to a credit against such tax, shall be deemed to be a penalty or forfeiture within the meaning of section 57j of the Act entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' approved July 1, 1898, as amended."*

Section 902, subdivision (c) (i) clearly reveals that Congress construed section 57j of the Bankruptcy Act as being applicable to taxes levied against the Trustee in Bankruptcy during administration and by reason thereof adopted the aforecited provision that such credit should not be deemed to be a penalty within the meaning of section 57j of the Bankruptcy Act. This must be self-evident. If section 57j did not apply to taxes levied against the trustee in bankruptcy, then the aforesaid section 902, subdivision (c) (i) of the Internal Revenue Code would have been merely an idle act on the part of Congress. Correct statutory interpretation requires that effect be given to every word and provision of an Act. To do so in this case, we must assume the premise that section 57j is applicable in connection with taxes levied against trustees in bankruptcy. It was to avoid such construction in connection with the aforecited Social Security Act that said amendment was adopted.

## The Bankruptcy Law Is the Supreme Law of the Land.

The Honorable Circuit Court of Appeals for the Ninth Circuit in a number of its decisions, including the instant case, has fallen into the error of holding that all State laws of whatever nature are conclusively binding upon the bankruptcy courts. The Circuit Court appears to follow the theory that bankruptcy courts are powerless to deviate from State laws in any respect. This error is apparent in the following decisions:

*In re. Knox-Powell-Stockton Co., Inc.*, 100 Fed. (2d) 979;

*Laugharn v. State of California*, 77 Fed. (2d) 1005.

The governing rule, however, which has been formulated and announced by this Honorable Court is that where the Bankruptcy Law deals with property rights which are regulated by State laws, the Federal courts in bankruptcy will follow the State courts; but when the language of Congress indicates a policy requiring a broader construction of the statute than the State decision would give it, Federal courts cannot be concluded by them. *Board of Trade of Chicago v. Johnson*, 264 U. S. 1, 68 L. Ed. 533, 44 Sup. Ct. 232.

The Bankruptcy Law is paramount and the jurisdiction of the Federal courts in bankruptcy when properly invoked, to wind up the affairs of an insolvent is essentially exclusive. *Re Watts*, 190 U. S. 1, 47 L. Ed. 933, 23 Sup. Ct. 718.

In the case of *International Shoe Co. v. Pinkus*, 278 U. S. 261, 73 L. Ed. 318, 49 Sup. Ct. 108, this court definitely laid down the rule that the power of Congress,

under Constitution Article I, sec. 8, cl. 4, to establish uniform law on the subject of bankruptcy throughout the United States is unrestricted and paramount.

In the case of *Van Huffel v. Harkelrode*, 284 U. S. 225, 227, 76 L. Ed. 256, 52 Sup. Ct. 115, the right of the bankruptcy court to require the sale of property subject to a State lien for taxes was challenged. In that case this Honorable Court held:

"No good reason is suggested why liens for State taxes should be deemed to have been excluded from the scope of this general power to sell free from encumbrances. Section 64 of the Bankruptcy Act grants to the court express authority to determine 'the amount or legality' of any tax. \* \* \* Realization upon the lien created by the State law must yield to the requirements of bankruptcy administration."

Illustrative of the intention of Congress to retain the power to subject statutory tax liens to rules of procedure and administration defined under the Bankruptcy Act is section 67c of the Bankruptcy Act of 1938, which reads as follows:

"Where not enforced by sale before the filing of a petition in bankruptcy or of an original petition under chapter X, XI, XII, or XIII of this Act, though valid under subdivision b of this section, statutory liens, including liens for taxes or debts owing to the United States or to any State or subdivision thereof, on personal property not accompanied by possession of such property, and liens, whether statutory or not, of distress for rent shall

be postponed in payment to the debts specified in clauses (1) and (2) of subdivision a of section 64 of this Act, and, except as against other liens, such liens for wages or for rent shall be restricted in the amount of their payment to the same extent as provided for wages and rent respectively in subdivision a of section 64 of this Act."

Under this enactment Congress subjects statutory liens, including liens for taxes owing to any State or subdivision thereof, to postponement in payment to various other debts. If it were the intention of Congress to completely deny the recognition of statutory liens for taxes, it would have the right by the enactment of appropriate legislation to effect such a result.

The State of New York in the case of *New York v. Irving Trust Co.*, 288 U. S. 329, 77 L. Ed. 815, 53 Sup. Ct. 389, challenged the right of the bankruptcy court to disallow a claim for State taxes because of the expiration of a bar order. Here again the United States Supreme Court upheld the paramount power of the bankruptcy court, and said:

"The Federal government possesses supreme power in respect of bankruptcies. *International Shoe Co. v. Pinkus*, 278 U. S. 261, 265, 73 L. Ed. 318, 320, 49 Sup. Ct. 108. If a state desires to participate in the assets of a bankrupt, she must submit to appropriate requirements by the controlling power; otherwise, orderly and expeditious proceedings would be impossible and a fundamental purpose of the Bankruptcy Act would be frustrated."



It has been held that in bankruptcy administration the Federal court is not concerned with State statutes relating to preferences which provide a different test of liability from that contained in section 60 of the Bankruptcy Act. *Carey v. Donohue*, 240 U. S. 430, 60 L. Ed. 726, 36 Sup. Ct. 386.

Nor is the matter of the possibility of the bankruptcy court impairing the obligation of contracts, important. An interesting illustration of the right and authority of Congress in bankruptcy legislation to impair the obligation of contracts was evidenced in that provision of section 77b of the Bankruptcy Act, being subdivision (b) (10) of that section wherein there was a limitation to three years on the amount which a lessor may claim on account of the rejection of a lease in proceedings under the Bankruptcy Act to reorganize the lessee. This court in the case of *Kuelner v. Irving Trust Co.*, 299 U. S. 445, 452, 81 L. Ed. 340, 57 Sup. Ct. 298, held that section did not violate the due process clause of the Fifth Amendment of the Constitution and stated the rule in the following pertinent language:

"The equitable distribution of the bankrupt's assets, or the equitable adjustment of creditors' claims in respect of those assets, by way of reorganization, may therefore be regulated by a bankruptcy law which impairs the obligation of the debtor's contracts. Indeed every bankruptcy act avowedly works such impairment. While, therefore, the Fifth Amendment forbids the destruction of a contract it does not prohibit bankruptcy legislation affecting the creditor's remedy for its enforcement against the debtor's as-



sets, or the measure of the creditor's participation therein, if the statutory provisions are consonant with a fair, reasonable, and equitable distribution of those assets."

See also:

*Louisville etc. Bank v. Radford*, 295 U. S. 555, 79 L. Ed. 1593, 55 Sup. Ct. 854.

The court has held that the Bankruptcy Act has a two-fold purpose, to-wit, (1) to convert the estate into cash and to distribute it among creditors, and (2) to then give the bankrupt a fresh start with such exemptions and rights as the statute left untouched. *Burlingham v. Crouse*, 228 U. S. 459, 57 L. Ed. 920, 33 Sup. Ct. 564; *Central Trust Co. of Ill. v. Chicago Auditorium Assn.*, 240 U. S. 581, 60 L. Ed. 811, 36 Sup. Ct. 412; *Williams v. U. S. F. & G. Co.*, 236 U. S. 549, 59 L. Ed. 713, 35 Sup. Ct. 289.

Section 57j of the Bankruptcy Act was enacted for the purpose of giving effect to that purpose of the Bankruptcy Act which is dedicated to effecting an equitable distribution of the bankrupt's estate amongst creditors.

In its decision in the case of *Kothe v. Taylor Trust*, 280 U. S. 224, 227, 74 L. Ed. 382, 50 Sup. Ct. 142, wherein the court declared: "The broad purpose of the Bankruptcy Act is to bring about an equitable distribution of the bankrupt's estate among creditors holding just demands based upon adequate consideration." (Italics ours.)

Note that this court recognized that it was not only the justice of the demand which would qualify the claim for distribution among creditors. The court was interested in directing that the claim should be both just and based upon "*adequate consideration*". The tax of the State of California in this case may be just and the consideration may be justified by virtue of the fact that one using the streets and highways of the State of California should contribute to the cost of such use. The only justification, however, for the recovery of the penalties, as in this case, is the fact that a fine or punishment is imposed upon the taxpayer for failing to make timely payment of the tax. This is not an adequate consideration as recognized by Congress, because section 57j expressly prohibits its recognition. Congress had a right to determine that such a claim is not sufficiently based upon an adequate consideration to share with general creditors who have just claims based upon *adequate consideration*. In so far as any State law interferes with the provisions of Congress for the administration of bankruptcy estates, such State laws are subordinate to and inferior to the paramount jurisdiction of the bankruptcy court which is charged with the duty of effecting equitable distribution amongst creditors of the insolvent's estate. Thus, in the case of *New York v. Irving Trust Co., supra*, the court held that the State must submit to the appropriate requirements of the bankruptcy court or "otherwise, orderly and expeditious proceedings would be impossible and a fundamental purpose of the Bankruptcy Act would be frustrated".

### Conclusion.

Respondents conclude their brief with a quotation from the case of *Bull v. United States*, 295 U. S. 247, at 259, 55 Sup. Ct. 695 at 699, in which the Court said:

"Taxes are the life blood of government and their prompt and certain availability an imperious need."

With this policy petitioner is fully in accord. However, Congress has wisely provided that only actual taxes and not punitive measures are to be distributable in the liquidation of a bankruptcy estate. To permit taxing bodies to receive preference not only as to taxes but also as to penalties, when the assets of a bankruptcy estate are being salvaged for general creditors, is to permit the sacrifice of the rights of actual creditors who have parted with good and valuable considerations for the benefit of taxing bodies who seek not only the tax, but the penalties which are included only as a club for the enforcement of the collection of taxes. The intention of Congress was clear. Congress made provision for the equitable distribution of such salvaged assets. We believe that we are giving effect to such intention of Congress in asking that the decision of the Circuit Court of Appeals be reversed.

Respectfully submitted,

THOMAS S. TOBIN,  
*Counsel for Petitioner,*

RAPHAEL DECHTER,  
JOSEPH J. RIFKIND,  
DAVID SCHWARTZ,  
*Of Counsel.*





APR 12 1939

SHARLEY & MORE JUDICIAL  
STAMPS

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. **745** **15**

L. BOTELEB, Trustee of the Estate of RICH-  
MAID CREAMERIES, INC., a corporation,  
Debtor, *Petitioner,*

vs.

RAY INGELS, Director of Motor Vehicles of  
the State of California; HOWARD E.  
DEEMS, as Registrar of Motor Vehicles of  
the State of California, and the MOTOR  
VEHICLE DEPARTMENT OF THE  
STATE OF CALIFORNIA, *Respondents.*

No. **746** **16**

L. BOTELEB, Trustee of RICHMAID  
CREAMERIES, INC., a corporation, Debtor,  
*Petitioner,*

-vs.

RAY INGELS, Director of Motor Vehicles of  
the State of California, and HOWARD E.  
DEEMS as Registrar of Motor Vehicles of  
the State of California, *Respondents.*

RESPONDENTS' BRIEF

✓ EARL WARREN,

Attorney General of  
the State of California,

✓ By FRANK W. RICHARDS,

Deputy Attorney General of  
the State of California,

*Counsel for Respondents.*





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# In the Supreme Court

OF THE

## UNITED STATES

OCTOBER TERM, 1938

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MAID CREAMERIES, INC., a corporation,  
Debtor, *Petitioner,*

vs.

RAY INGELS, Director of Motor Vehicles of  
the State of California; HOWARD E.  
DEEMS, as Registrar of Motor Vehicles of  
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VEHICLE DEPARTMENT OF THE  
STATE OF CALIFORNIA, *Respondents,*

No. \_\_\_\_\_

L. BOTELER, Trustee of RICHMAID  
CREAMERIES, INC., a corporation, Debtor,  
vs. *Petitioner,*

RAY INGELS, Director of Motor Vehicles of  
the State of California, and HOWARD E.  
DEEMS as Registrar of Motor Vehicles of  
the State of California, *Respondents.*

### RESPONDENTS' BRIEF

### OPINION BELOW

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit is reported in 10 Fed. (2d) 915 (R. I, 131). No opinion was written by the district court.

## STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED BY PETITIONER

“(a) The act of the Circuit Court of Appeals for the Ninth Circuit in holding that the bankrupt estate is liable for penalties accruing during the pendency of the bankruptcy is contrary to Section 57j of the Bankruptcy Act and defeats the purpose and scope of the Bankruptcy Act as defined by Congress.

“(b) That the act of the Circuit Court of Appeals for the Ninth Circuit is of peculiar public interest and presents a fundamental question of law upon which there should be no diversity of opinion in the several Circuit Courts of Appeal. That the decision of the Circuit Court of Appeals for the Ninth Circuit is in direct conflict with the Circuit Court of Appeals for the Seventh Circuit, in the case of *In re Messenger's Merchants Lunch Rooms, Inc.*, 85 Fed. (2d) 1002, and with the Circuit Court of Appeals for the Third Circuit in the case of *New Jersey v. Pressed Steel Car Co.*, 100 Fed. (2d) 147. That the uncertainty created by the conflict in the Circuit Courts adversely affects the expeditious administration and closing of innumerable pending bankruptcy cases and will continue to so affect such cases and future bankruptcy cases until and unless this Court shall exercise its power of supervision and hear and determine the present question.” (P. 7.)

## JUDGMENTS TO BE REVIEWED

On December 15, 1938, the court below entered a decree reviewing the order of the lower court in each of the two causes on appeal (R. I, 144; R. II, 57), one entitled Ray Ingels, Director of Motor Vehicles of the State of California, Howard E. Deems, as Registrar of Motor Vehicles of the State of California, and the Motor Vehicle Department of the State of California, appellants, vs. L. Boteler, trustee of the estate of Richmaid Creameries, Inc., a corporation, debtor, appellee, No. 8711; and the other entitled Ray Ingels, Director of Motor Vehicles of the State of California, and Howard E. Deems, as Registrar of Motor Vehicles of the State of California, appellants, vs. L. Boteler, Trustee of Richmaid Creameries, Inc., a corporation, appellee, No. 8761.

Said causes were consolidated in the court below for briefing, argument and decision (R. II, 57), and for convenience we have referred and shall hereinafter refer to the record in appeal No. 8711 as R. I, and in appeal No. 8761 as R. II.

### **SPECIFIC CLAIMS ADVANCED AND RULINGS MADE IN THE LOWER COURT WHICH ARE RELIED UPON BY PETITIONER AS THE BASIS OF THIS COURT'S JURISDICTION (p. 10)**

1. That the lower court erred in holding that section 57j of the Bankruptcy Act is not applicable to penalties which accrue during the course of the administration of a bankrupt estate, while the estate



is being operated incidental to its liquidation. (R. I, 140.)

2. That the lower court erred in holding that the State of California has a lien on the property of the bankrupt estate which lien accrued during the course of administration of the bankruptcy estate. (R. I, 141.)

3. That the lower court erred in holding that the act of June 18, 1934 (48 Stat. 993, 28 U. S. C. A. Sec. 124a) subjects the trustee in bankruptcy to liability for penalties attached to state taxes (R. I, 141); and

4. That the lower court erred in holding that both the district court and the referee in bankruptcy erred in finding that the trustee had no funds with which to pay the motor vehicle taxes. (R. I, 137.)

### **JURISDICTIONAL STATUTORY PROVISION**

The jurisdiction of this court is invoked by petitioner under section 240 of the Judicial Code, 28 U. S. C. A. 347. No reference is made by petitioner to cases believed to sustain jurisdiction. (P. 10.)

### **QUESTION PRESENTED BY PETITION**

The petition presents one question only, namely (p. 2):

“Is a bankrupt estate liable for penalties imposed by state statutes for nonpayment of automobile license fees where license fees and penalties claimed accrued during operation for

purposes of liquidation of the business of the bankrupt estate by the Trustee in Bankruptcy?"

### STATEMENT OF CASE

The facts as set forth in the petition, which petitioner states were taken from the opinion of the court below and upon which the foregoing question arose (p. 3), are not as fully stated as we think they should be, and, therefore, since the factual matters are brief and undisputed, we shall state them in full from the opinion (R. I, 131-137):

"The Richmaid Creameries, Inc., filed its petition under Section 77b of the Bankruptcy Act (11 U. S. C. A., Sec. 207) in the court below on September 16, 1936, and on the same day John H. Chamness was appointed temporary trustee, with authority to operate the business of the debtor. Prior to September 16, 1936, The Richmaid Creameries, Inc., was engaged in the creamery business in Wilmington, California, owning certain milk and ice cream routes and making deliveries thereon and operating twenty-seven automobiles and trucks in the course of such business.

"The temporary trustee began to operate the business and borrowed money for that purpose, but his first month of operation of the business resulted in a loss of \$2,865.00. On December 22, 1936, the District Court entered an order directing liquidation of the assets of the debtor, continuing the trustee in office for that purpose, and referred the estate generally to the referee for further administration.

“January 5, 1937, a schedule of assets and liabilities of Richmaid was filed, showing assets of \$148,380.02, and liabilities of \$87,089.64, including \$2,000.00 borrowed by the trustee on certificates.

“January 20, 1937, L. Boteler, appellee here, was appointed trustee in bankruptcy for the purpose of liquidating the assets of Richmaid.

“During the months of January and February, 1937, and up to and including February 27, 1937, the temporary trustee and the trustee, respectively, continued to operate the business of Richmaid and to make the usual deliveries of milk and ice cream on the aforesaid ‘routes.’ The trustee issued checks against the estate in payment of expenses in connection with the operation of the business. When there were insufficient funds in the estate to pay the checks, the trustee, on some occasions cashed the same out of his own personal funds and held the checks until there were sufficient funds in the bankrupt estate with which to pay the same.

“The total receipts of the trustee from September 16, 1936, to January 19, 1937, were \$70,006.23, and the total disbursements for the same period were \$79,647.65; the total receipts from January 20, 1937, the date when the appellee assumed trusteeship of the estate of Richmaid, to February 4, 1937, were \$7,899.61, while the total disbursements for the same period were \$7,624.46.

“Automobile license fees are due and payable in the state of California on the first day of January of each year, to be paid at the time of registration or renewal thereof. (Sec. 3, Calif.

Vehicle License Fee Act (Ch. 362, Cal. Stats. 1935, as amended). Delinquency arises upon operation of a vehicle upon any highway of the State without the license fee having been paid and a penalty attaches if the fee is not paid within 30 days. (Sec. 6, *ibid.*) The penalty is by law added to the fee upon any application for annual renewal of registration made on or after February 5, unless the vehicle has not been operated on the highways of the state since the expiration date. (Sec. 378 (b) Calif. Vehicle Code.) Section 379 (a) of the California Vehicle Code provides that every registration or transfer fee and any penalty added thereto from the time the same became due, constitute a lien upon the vehicle for which due.

“Continuously during the month of January, 1937, and to and including February 27, 1937, the temporary trustee and the trustee operated the Richmaid automobiles and trucks upon the public highways of the state of California, carrying on the business of Richmaid.

“The trustee did not pay the California 1937 license fees upon said vehicles, in the amount of \$410.90, prior to February 5, 1937. On February 28, 1937, the referee made an order confirming the sale of Richmaid's milk and ice cream delivery routes and certain equipment, for the sum of \$8260.00. This was the first property sold in liquidation, and the trustee did not thereafter attempt to operate the business of the debtor.

“On or about February 27, 1937, 23 days after the statutory delinquency date, the trustee made application to the Department of Motor Vehi-

cles of the State of California for 1937 licenses for the motor vehicles referred to, tendering the fees, but not the penalties demanded by the statutes of California for violation of its motor vehicle license laws. Because of the refusal of the trustee to pay the penalties required by the laws of the state of California, the 1937 licenses were not issued to him.

“Thereafter, the trustee filed a petition with the referee for an order requiring the appellants here to show cause why the penalties assessed against the Richmaid motor vehicles should not be set aside and, further, to show cause why the 1937 license plates for said motor vehicles should not be issued to the trustee upon payment of the fees, exclusive of the penalties. Following this, the trustee filed an amended petition to require the appellants to show cause why they should not be required immediately to file such claims as they assert against the bankrupt estate or be forever barred from asserting such claims against said estate or against the motor vehicles, and further requiring said appellants to show cause why the trustee should not be authorized to sell the motor vehicles free and clear from any and all liens claimed by the motor vehicle department of the state of California upon said vehicles.

“The referee made certain findings of fact, most of which are set forth above, but, in addition, the referee made findings as follows:

“The court further finds that the trustee herein had absolutely no funds in his possession between the date of his appointment on the 20th day of January, 1937 and the 27th

day of February, 1937 with which to purchase the 1937 license plates for said motor vehicles . . . .

‘The court further finds that at no time prior to the 27th day of February, 1937, did said trustee have funds with which to pay said registration and license fees owing upon said motor vehicles and that the same condition existed from the date that the order of liquidation was made herein, to-wit, the 22nd day of December, 1936 to the date of the appointment of L. Boteler, the present trustee on the 20th day of January, 1937. That during the month of January, 1937 and up to the said 27th day of February, 1937, the trustee herein and his predecessor operated said vehicles upon the public highways of the State of California without the payment of any registration and license fees for said year.’

“The referee made an order setting aside all penalties assessed against the motor vehicles and directed the trustee to sell said motor vehicles free and clear of any and all liens thereon arising by reason of the failure of the trustee to pay the motor vehicle license tax provided under the laws of the state of California and commanding Ingels and Deems to file claims in the bankruptcy proceeding for the registration and license fees upon said motor vehicles within 30 days from the date of the order or be forever barred from asserting any claim or claims for taxes and/or registration or license fees against said motor vehicles and against this bankrupt



estate or the trustee herein, either in his official capacity as such trustee or individually.' The appellants petitioned the District Court to review the said order and the District Judge denied the petition and confirmed the order of the referee.

"In addition, the trustee had petitioned the referee for an order directing the appellants to receive the principal of the license fees in full payment of any and all sums owing by Richmond on said motor vehicles and enjoining collection or attempted collection by them of any penalties which the statutes of the state of California compelled them to collect. The referee declined to include such mandate in his order, and the trustee made application to the District Court, for a mandatory injunction directed to the appellants, requiring them to receive the statutory fees less the penalties and to deliver the license plates to the trustee, which issued the order as prayed.

"An appeal was allowed Ingels, Director of Motor Vehicles of the State of California, and Deems, as Registrar of Motor Vehicles, from each order."

## ARGUMENT

### I

Section 57j of Bankruptcy Act is not applicable.

### II

Act of June 18, 1934, c. 585, 48 Stat. 993 (28 U. S. C. A. 124a) is applicable.

### III

Decision of court below not in conflict with the decision of another circuit court of appeals on the same matter.

### IV

Court below did not err in holding that the State of California has a lien on the motor vehicles for licensee fees and penalties which accrued during administration of the bankrupt estate.

### V

Court below did not err in holding that the trustee had funds with which to pay the motor vehicle license fees.

### I

#### **Section 57j of Bankruptcy Act Is Not Applicable**

Section 57j of the Bankruptcy Act (11 U. S. C. A. 93j) reads as follows:

“Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed; except for the amount of the pecuniary loss sustained by the act, transactions, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law.”

Debt is defined in section 1, subd. (11), of the Bankruptcy Act as follows:

“‘Debt’ shall include any debt, demand, or claim provable in bankruptcy;”

The court below said in its decision that,

“Obviously, the section refers to debts owing by the bankrupt and not by the trustee.” (R. I. 140)

The court further said,

“If the taxes in question were due and payable at the time of the filing of the petition, they would be provable, and it follows, under Section 57 (j) of the Act (11 U. S. C. A. Sec. 93 (j)), penalties thereon would not be allowable, save to the extent permitted by said section. (R. I. 138.)

“But here we are confronted with a different set of facts. These taxes became fixed by reason of the operation of the business by the trustees, after the date of the filing of the petition and after the date of what in effect amounted to an adjudication. It should be obvious that a debt or claim created thereby was not provable, not being in existence at the time of the filing of the petition and, therefore, not dischargeable.” (R. I. 138.)

In *Cantor vs. Cherry* (C. C. A. 3), 73 Fed. (2d) 188, 189, the court said:

“In order to prove a claim in bankruptcy, the obligation must have been in existence at the time of the filing of the petition.” (Certiorari denied, 293 U. S. 626, 55 S. Ct. 346, 79 L. Ed. 712.)

Even a contingent liability of the bankrupt is not a debt provable in bankruptcy (*Colman Co. vs. Withoft* (CCA 9), 195 Fed. 250), much less is a lia-

bility created by a trustee of the bankrupt estate, such as we have in the instant case.

The decision of the court below correctly states the law in the following language:

“Whether a debt or claim is provable in bankruptcy turns upon its status at the time of the filing of the petition (Sec. 760, Remington on Bankruptcy, 4th ed.); claims not owing at the time of filing of the petition are not provable (Sec. 807, Remington; *Colman Co. v. Withoft* (CCA 9), 195 F. 250, 252; *Cantor v. Cherry* (CCA 3), 73 F. (2d) 188.) Section 1 (9) of the Bankruptcy Act (11 U. S. C. A., Sec. 1) includes, in the definition of ‘creditor’ anyone who owns a demand or claim provable in bankruptcy. While actually neither demand nor claim, taxes are ‘provable’ in their nature. (Sec. 845, Remington).” (R. I, 137.)

Therefore, section 57j of the Bankruptcy Act, which pertains to debts, demands and claims provable in bankruptcy, is not applicable to the question of the liability of the bankrupt estate for penalties imposed by state statutes for nonpayment of automobile license fees where license fees and penalties claimed accrued during and by reason of the operation of the business of the bankrupt estate by the trustee for the purpose of liquidating the assets of said estate for the benefit of creditors.

II. °

**Act of June 18, 1934, Is Applicable**

The act of June 18, 1934, Chapter 585, 48 Stats. 993 (28 U. S. C. A. 124a), reads as follows:

**"STATE TAXATION; BUSINESS CONDUCTED BY RECEIVERS, TRUSTEES, OR OTHER COURT OFFICERS SUBJECT TO**

Any receiver, liquidator, referee, trustee, or other officers or agents appointed by any United States court who is authorized by said court to conduct any business, or who does conduct any business, shall, from and after June 18, 1934, be subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation: **PROVIDED, HOWEVER,** That nothing in this section contained shall be construed to prohibit or prejudice the collection of any such taxes which accrued prior to June 18, 1934, in the event that the United States court having final jurisdiction of the subject matter under existing law should adjudge and decide that the imposition of such taxes was a valid exercise of the taxing power by the State or States, or by the civil subdivisions of the State or States imposing the same."

The court below in its decision said:

"By the Act of June 18, 1934, (48 Stat. 993, 28 U. S. C. A. Sec. 124 (a)), a trustee who is authorized by any United States Court to conduct any business, and does so, is subject to all State and local taxes applicable to such business the same as if such business were conducted

by an individual or corporation.' This is sufficient basis for the attachment of the penalty and lien." (R. I, 141.)

The court further said:

"The right of the trustee, under order of the court, to operate the business for a limited period cannot be challenged, but the estate, save as to existing lienholders not consenting—of which there are apparently none here, is liable for the charges incurred, even to the extent of the depletion of the assets of the estate, even to the detriment of labor claimants. The reason is simple: The operation of the business in such situation is for the benefit of the creditors. Remington, Sec. 2662, 445, 446. (R. I, 138.)

"The motor vehicle license or registration fee is a privilege tax levied in exercise of the police power to control and regulate travel on the public highways. It is not considered as a tax on the motor vehicle itself, but for the privilege of using the highways. *Blashfield, Cyc. of Automobile Law*, Sec. 212, Vol. 1, p. 158. A license to operate a motor vehicle is granted under the inherent right of the state or municipality to regulate its use on the public highways or streets. *Ibid.*, Sec. 211, p. 157. The only automobiles required to be registered under the California Motor Vehicle Act are vehicles to be used upon the public highway (*Cal. Stats. 1927*, p. 1424; *California Standard Finance Corp. v. Riverside Finance Co.*, 111 Cal. App. 151, 163, 295 P. 555); if the vehicles were not used, no registration fee would have fallen due under the law of California. But, in carrying on the business



of Richmond, the motor vehicles were operated upon the public highways of the state of California and thereby the registration and license fees attached. They were not paid, but became delinquent, and on February 5, 1937, the penalties prescribed by law applied. California Vehicle Code, Sec. 370, *et seq.*; California Vehicle License Fee Act, Sec. 6. (R. I, 139.) (Statutes and Code sections mentioned above are set forth in the Appendix hereto.)

"The motor vehicles in question could not be operated in 1937 without incurring the license and registration fees. Necessarily, therefore, the fees were an expense of doing business and were chargeable against the estate. The trustee has the duty of seeking out and paying all taxes (Sec. 847, Remington). He knew, or should have known, that a license fee was required before the motor vehicles could be legally operated upon the public highways, although, if the motor vehicles had not been used the fees would not have become payable.

"Were the motor vehicles operated by Richmond itself, or any other person or corporation, there would be no question of liability for the penalties. Is a trustee operating a business absolved from compliance with law?"

— "The normal course of procedure in bankruptcy is liquidation, not continuance of the business of the bankrupt. Where the business of the bankrupt is conducted for a limited period by the trustee, upon order of the court, the purpose is to benefit the creditors. The expenses of operation must be paid out of the estate.

That the license and registration fees are legitimate expenses, there can be no question." (R. I, 139-141.)

The court below, in holding that the estate is liable for the penalties, quoted the authorities as follows:

"The Supreme Court, in the case of *Swarts v. Hammer*, 194 U. S. 441, 444, said: 'By the transfer to the trustee no mysterious or peculiar ownership or qualities are given to the property. It is dedicated, it is true, to the payment of the creditors of the bankrupt, but there is nothing in that to withdraw it from the necessary protection by the State and municipality, or which should exempt it from its obligations to either.' (R. I, 141.)

"In *State of California v. Hisey*, 84 F. (2d) 802, 805, a receivership case, we held that the appointment of a receiver by a court of equity could not have any effect upon the right of the State of California to collect penalties for unpaid taxes; that receivers had been compelled in numerous cases to pay penalties for nonpayment of taxes which accrued subsequent to their appointment. We further held that if the penalty, as well as the tax, is a lien upon the property in the hands of a receiver, as the statutes of California provide, it is difficult to see how the payment of the penalty can be differentiated from the payment of the lien for the tax \* \* \*. The penalty is a part of the tax. \* \* \*. Compare *Michigan v. Michigan Trust Co.* 286 U. S. 334, 344; *People v. Hopkins* (CCA 2), 18 F. (2d) 731, 733; *McFarland v. Hurley*

(CCA 5), 286 F. 365, 366; *Coy v. Title Guarantee & Trust Co.* (CCA 9), 220 F. 90, 92.

"This view is upheld by the United States Circuit Court of Appeals for the Second Circuit. In the case of *In re Humeston*, 83 F. (2d) 187, 189, that court said:

\* \* \* Such taxes as fell due during the period of the trustee's occupation were part of the expenses of that occupation and should be borne by the estate. \* \* \* When \* \* \* the mortgagor's trustee continues the occupation, he necessarily means to exploit it for profit, and the gross returns must pay the running expenses. Thus taxes which became payable between November 1, 1933, and May 21, 1935, must be paid, and not only the entire face of these, but all interest and penalties accumulated upon them. It was the trustee's duty to pay them when they fell due and the estate must suffer from his failure. \* \* \* (Emphasis is by the court.) (R. I, 142.)

"Additional authority may be found *In re Preble Corporation* (D. C. Me.), 15 F. Supp. 775, 776 (Aff. on different grounds 84 F. (2d) 73; cert. den. 299 U. S. 575):

"Generally, speaking, property in the custody and control of federal receivers and trustees is subject to taxation under state law the same as any other property. \* \* \* (Cases cited.)

\* \* \*

"A proper performance of the duty to protect the property intrusted to its agents by the court requires the payment of taxes. In this case taxes

are a part of the necessary expense of carrying on the business.

“The trustee is subject to all state and local taxes which are applicable to the business which he conducts.”

“If the trustee fails to pay taxes in a proper case, although he has sufficient funds to do so, and thereby subjects the estate to interest and penalties, he will be surcharged to the extent of such interest and penalties.” Gerdes on Corporate Reorganizations, vol. 1, section 400.” (R. I, 143.)

In the case of *In re Humeston*, 83 Fed. (2d) 187, a bankruptcy matter, quoted by the court below in its decision, the trustee took possession of certain real-estate belonging to the bankrupt estate and collected the rents therefrom. He failed to pay the taxes that accrued while the property was in his possession and finding that there was no equity left in the property over and above encumbrances, desired to abandon it. This the referee refused to allow, and ordered the trustee to sell the property subject to all liens. The mortgagees filed a petition claiming the rents. This the referee refused to allow. Appeals were taken from these two orders. The court held:

“However, they (mortgagees) were entitled to some relief. Such taxes as fell due during the period of the trustee's occupation were part of the expenses of that occupation and should be borne by the estate (citing authorities). This is not contrary to our decision *In Re Kings*

*County Real Estate Corporation (C.C.A.)* 67 F. (2d) 895. There, a second mortgagee had got the rents sequestered in his favor, and we held that he might take them without deduction, leaving unpaid even those taxes which accrued during occupation. In this we followed the New York law, *Ranney vs. Peyser*, 83 N. Y. 1. The distinction is that a mortgagee who enters or gets a sequestration order does not by that alone embark upon a venture on the land; he is merely collecting his debt. He may indeed, as we suggested, put himself in the same class as the mortgagor, if for instance he delays foreclosure so long that it is reasonable to infer that he is using the land as an independent enterprise; but the sequestration is not enough without more. When on the other hand the mortgagor's trustee continues the occupation, he necessarily means to exploit it for profit, and the gross returns must pay the running expenses. Thus taxes which became payable between November 1, 1933, and May 21, 1935, must be paid, and not only the entire face of these, but all interest and penalties accumulated upon them. It was the trustee's duty to pay them when they fell due, and the estate must suffer from his failure. The first order will therefore be modified to conform to this disposition. (Order dismissing petition of mortgagees claiming the rents.)

"We cannot see by what warrant the mortgagees challenge the sale of the equity. It is true that they are general creditors as well as lienors, but as creditors they can have no interest in preventing a sale; and as mortgagees it cannot affect their remedies in any way whatever.

“Order denying the motion for payment of rents modified as above; appeal dismissed from the order directing sale.”

We are unable to perceive of any legal reason why the bankrupt estate herein should not suffer if the bankrupt estate *In re Humeston, supra*, had to suffer by the payment of penalties for the failure of the trustee to pay taxes when due on property from which he had collected rents during the administration of the estate. The trustee in the instant case used the highways of the State of California for the purpose of delivering milk and ice cream by motor vehicles in carrying on the business of the bankrupt estate. In so conducting this business it was his duty to pay the State's fees for such use of the highways, and it follows that from his failure to pay said fees when due, the bankrupt estate is liable for penalties.

The holding of the court below that the act of June 18, 1934 (28 U. S. C. A. 124a), is applicable and not section 57j of the Bankruptcy Act, is supported by the weight of authority. The decision does not defeat the purpose or scope of the Bankruptcy Act as defined by congress, as contended by petitioner, but places a legal duty on a trustee in bankruptcy to pay all taxes when due where he operates the business of the bankrupt, which are applicable to such business. This was the intention of congress when it passed the act of June 18, 1934. And the decree of the court below, in ordering the taxes and penalties paid on the motor vehi-



cles disposed of subject to the lien for taxes and penalties (R. I, 145), is in accord with the decree of the Circuit Court of Appeals for the Second Circuit in the case of *In re Humeston, supra*.

### III

#### Decision of Court Below Not in Conflict With Decision of Another Circuit Court of Appeals on the Same Subject

“In so far as the decision *In re Messenger's Merchants Lunch Rooms, Inc.* (CCA 7), 85 F. (2d) 1002, cited by the appellee as authority for affirmance, is in conflict herewith, it is expressly disapproved.” (R. I, 144.)

It is upon the authority of the above case and the case of *In re Pressed Steel Car Co. of New Jersey*, 100 Fed. (2d) 147, decided by the Circuit Court of Appeals for the Third Circuit, that petitioner seeks to invoke the jurisdiction of this court. (P. 7.)

In the case of *In re Messenger's Merchants Lunch Rooms, Inc.*, the State of Illinois filed a claim with the bankruptcy court seeking to recover penalties, under the Retailers' Occupational Tax Law of the state, on sums due prior to the filing of the petition in bankruptcy and on sums due by the receivers in the operation of the bankrupt's business. The district court disallowed the claim and its order was affirmed by the circuit court of appeals upon the grounds, first, that penalties are not provable in bankruptcy; second, that the Act of

June 18, 1934 (28 U. S. C. A. 124a), applies only to taxes and not to penalties; and, third, that the conditions precedent, necessary to the recovery of penalties provided in said law, were not complied with.

The second ground is the only one which requires attention of this Honorable Court in passing upon the petition herein, because as to the first ground, it is well settled that penalties as such are not provable in bankruptcy, and the facts in the instant case show that no attempt was made by respondents to have the bankruptcy court allow penalties; and as to the third ground, that situation is not present in the instant case.

As to the holding that the act of June 18, 1934, applies only to taxes and not to penalties (second ground), the court was not then considering, nor did it have before it, a statute which made the penalty a part of the tax. This feature of the California statute was considered by the court below in the instant case. The court said:

"Automobile license fees are due and payable in the state of California on the first day of January of each year, to be paid at the time of registration or renewal thereof. (Sec. 3, Calif. Vehicle License Fee Act (Ch. 362, Cal. Stats. 1935, as amended).) Delinquency arises upon operation of a vehicle upon any highway of the State without the license fee having been paid and a penalty attaches if the fee is not paid within 30 days. (Sec. 6, *ibid.*) The penalty is by law added to the fee upon any application for annual renewal of registration made on or

after February 5, unless the vehicle has not been operated on the highways of the state since the expiration date. (Sec. 378 (b) Calif. Vehicle Code.) Section 379 (a) of the California Vehicle Code provides that every registration or transfer fee and any penalty added thereto, from the time the same became due, constitute a lien upon the vehicle for which due." (R. I, 133.) (Statutes and code sections set forth in Appendix.)

\* \* \* \* \*

"In *State of California v. Hisey*, 84 F. (2d) 802, 805, a receivership case, we held that the appointment of a receiver by a court of equity could not have any effect upon the right of the State of California to collect penalties for unpaid taxes; that receivers had been compelled in numerous cases to pay penalties for nonpayment of taxes which accrued subsequent to their appointment. We further held that 'If the penalty, as well as the tax, is a lien upon the property in the hands of a receiver, as the statutes of California provide, it is difficult to see how the payment of the penalty can be differentiated from the payment of the lien for the tax.' \* \* \* The penalty is a part of the tax \* \* \* Compare *Michigan v. Michigan Trust Co.*, 286 U. S. 334, 344; *People v. Hopkins* (CCA 2), 18 F. (2d) 731, 733; *McFarland v. Hurley* (CCA 5), 286 F. 365, 366; *Coy v. Title Guarantee & Trust Co.* (CCA 9), 220 F. 90, 92." (R. I, 142.)

Therefore, as to the case of *In re Messenger's Merchants Lunch Rooms, Inc.*, *supra*, we think it

distinguishable in two important respects, first, that the Retailers' Occupational Tax Law of Illinois did not make the penalty a part of the tax and, second, that a claim for the allowance of penalties was there under consideration, whereas, the instant case involves merely the right of the State of California to refuse to register and issue license plates for motor vehicles of a bankrupt estate where the trustee refuses to pay penalties on delinquent taxes which accrued by reason of the operation of such motor vehicles on highways of the state by the trustee in carrying on the business of the estate.

In the mentioned case of *In re Pressed Steel Car Co.* of New Jersey, the state of New Jersey filed a claim seeking to recover corporation franchise taxes and a penalty of 1 per cent per month. The district court disallowed the claim for taxes as well as the penalty. The circuit court of appeals reversed the lower court and directed the lower court to allow the claim for taxes but not for the penalty and directed the lower court to proceed in conformity with the opinion of the circuit court, which opinion went no further than to say, in regard to the allowance of penalties (p. 153), that section 57j of the Bankruptcy Act prohibits the allowance of penalties upon claims in bankruptcy proceedings and that,

"In the case at bar we presume that the State of New Jersey will not object to receiving simple interest and if this be so, such interest should be allowed on the claims."

The above case is not an authority against which the decision in the instant case conflicts. There, a claim for the allowance of a penalty was filed. In the instant case respondents did not file a claim and in fact refused so to do and objected to the jurisdiction of the referee in bankruptcy to order them to file a claim, which objection was overruled. (R. I, 23.)

The decree of the court below did not direct the district court to allow a claim, but directed said court to order the regulation and license fees and accrued penalties paid, or, in the alternative, to permit the motor vehicles to be disposed of subject to the lien of the State of California for the unpaid taxes and penalties. (R. I, 144.) In other words, the lien of the State was recognized by the upper court.

For the foregoing reasons the decision herein is not in conflict with the decision in either of the above cases cited by petitioner.

#### IV

**The Court Below Did Not Err in Holding That the State of California Has a Lien on the Motor Vehicles for License Fees and Penalties Which Accrued During Administration of the Bankrupt Estate**

The decision of the court below states,

"Section 379 (a) of the California Vehicle Code provides that every registration or transfer fee and any penalty added thereto from the

time the same became due, constitutes a lien upon the vehicle for which due." (R. I, 133.)

Section 6 of the California Vehicle License Fee Act (See Appendix) provides as follows,

"Every license fee and any penalty added thereto, from the date the same becomes due, constitute a lien upon the vehicle for which due."

The court further stated in its decision,

"The general rule is that the law of the state will control as to the nature of a lien, its creation, the time of taking effect. See. 1891, Remington. Under Section 124 (a) of 28 U. S. C. A., it follows that the lien in this case is valid." (R. I, 141.)

Petitioner fails to point out how or in what manner the holding of the court below conflicts with the decision of another circuit court of appeals. He rests his specification of error on the contention that section 57j of the Bankruptcy Act is applicable and not the act of June 18, 1934. (P. 10.)

The Bankruptcy Act, as it read at the time of the present litigation, provides in section 67n (11 U. S. C. A. 107 (d)), that the validity of,

"Liens given or accepted in good faith and not in contemplation of or in fraud upon the provisions of this title, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by anything herein."



The present consideration for the lien in the instant case is unpaid taxes and penalties; the latter by the laws of the State of California became a part of the taxes.

We have heretofore shown that section 57j is not applicable in the instant case. Therefore the court below did not err in holding that the State of California has a lien on the motor vehicles for license fees and penalties which accrued during administration of the estate.

**V**

**The Court Below Did Not Err in Holding That the Trustee Had Funds With Which to Pay the Motor Vehicle License Fees**

Petitioner does not argue this specification of error. (P. 11.)

The court below in its decision, as to this matter, said:

“The referee made two findings of fact, set forth above, to the effect that the trustee had no funds with which to pay the license and registration fees prior to February 5, 1937. These findings are contrary to the true facts. Actually during the period January 20, 1937, to February 4, 1937, large sums of money were received by the trustee, all of which were received and paid out before the license became subject to penalty, without taking into account the moneys received and disbursed in the operation of the business from January 1, to January 19, 1937.” (R. I, 137.)

However, the point is immaterial whether the trustee was with or without funds sufficient to pay the taxes when they fell due. This matter is inconsequential and petitioner so treats it.

### CONCLUSION

The grounds upon which petitioner seeks to invoke the jurisdiction of this honorable court are untenable, because,

(a) The act of the Circuit Court of Appeals for the Ninth Circuit in holding that the bankrupt estate is liable for penalties accruing during the pendency of the bankruptcy is not contrary to section 57j of the Bankruptcy Act and does not defeat the purpose or scope of the Bankruptcy Act as defined by congress; and

(b) The decision of the Circuit Court of Appeals for the Ninth Circuit is not of peculiar public interest, nor is it in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in the case of *In re Messenger's Merchants Lunch Rooms, Inc.*, *supra*, or with the decision of the Circuit Court of Appeals for the Third Circuit, in the case of *In re Pressed Steel Car Co. of New Jersey*, *supra*. The facts and state statutes considered by the court in those cases are not the same as were considered by the court below in the instant case.

For the reasons set forth herein by respondents, they respectfully submit that petitioner has failed

# MICRO CARD

TRADE

MARK



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# 65



to state grounds sufficient to invoke the jurisdiction of this honorable court.

Dated: April 5, 1939.

EARL WARREN,

Attorney General of  
the State of California.

By FRANK W. RICHARDS,

Deputy Attorney General of  
the State of California,

*Counsel for Respondents.*

## APPENDIX

Chapter 362, Statutes of 1935, Pages 1312-1315.

*"An act relating to licensing and taxing of vehicles, providing for license fees for the privilege of operating certain vehicles, providing for the exemption of such vehicles from all taxes according to value for State, county or municipal purposes, providing for the administration and enforcement of this act, creating a fund to be known as the motor vehicle license fee fund, and making an appropriation of the moneys therein.*

*"(Approved by the Governor June 25, 1935. In effect September 15, 1935.)*

*"The people of the State of California do enact as follows:*

*"SECTION 1. 'Vehicle' as used herein means every vehicle subject to registration under the Vehicle Code.*

*"'Department' means the Department of Motor Vehicles.*

*"SEC. 2. A license fee is hereby imposed for the privilege of operating in this State any vehicle. The annual amount of such license fee shall be a sum equal to one and three-quarters per cent of the actual market value of such vehicle, as determined by the department. The department annually shall compile and publish a list showing the market values as determined by it of each class of vehicle subject to the license fee hereby imposed, such vehicles being classified by make, type and year of manufacture. The license fee imposed by this act shall not apply to any vehicle not subject to registration under the Vehicle Code, nor to any vehicle*

owned by the State, any political subdivision of the State, or any city, city and county, county, district or public corporation.

“SEC. 3. Except as hereinafter provided, the license fee hereby imposed shall be due and payable to the department on the first day of January of each year. Such fee shall be paid to the department at the time of registration of such vehicle.

“SEC. 4. Upon vehicles registered for the first time in this State after the end of January of any year, the fee imposed by this act for such year shall be reduced one-twelfth for each month which shall have elapsed since the beginning of such year. No additional license fee shall be imposed under this act upon any vehicle upon the transfer of ownership of such vehicle if such license fee on such vehicle has already been paid for the year in which transfer of ownership occurs.

“SEC. 5. The license fee imposed under this act is in addition to any and all licenses and taxes otherwise imposed, except that no tax according to value shall hereafter be levied or imposed upon any vehicle upon which is paid the license fee required by this act. Such vehicles are hereby exempted from all taxes, State, county or municipal, according to value levied for State or local purposes.

“SEC. 6. Whenever any vehicle is operated upon any highway of this State without the license fee having first been paid as required by this act, such fee is delinquent. If such fee is not paid within thirty days after the same becomes delinquent, a penalty equal to such fee shall be added thereto and be collected therewith.



"Every license fee and any penalty added thereto, from the date the same becomes due, constitute a lien upon the vehicle for which due.

"The department shall collect such fee and any penalty by seizure of such vehicle from the person or persons in possession thereof, if any, and by the sale of such vehicle. The seizure and sale herein authorized shall be conducted and carried out by the department in the same manner as is provided by law for the seizure and sale of personal property by county assessors for the collection of taxes due on personal property. In the event, however, that the records of the department indicate that the registered owner of a vehicle so seized is not the legal owner thereof, as those terms are defined by the Vehicle Code, the department shall, before selling such vehicle, give notice to the legal owner of such vehicle by registered mail addressed to the last known address of such legal owner as shown by the records of the department, at least ten days prior to such proposed sale.

"SEC. 7. The duty of collecting the license fee imposed by this act and enforcing the provisions hereof is hereby imposed upon the department. The department shall give to each person paying such license fee a receipt therefor which shall sufficiently designate and identify the vehicle upon which such fee is paid.

"SEC. 8. The director of the department shall appoint and fix the salaries of such employees as may be necessary to administer and enforce the provisions of this act.

"SEC. 9. All moneys collected by the Department of Motor Vehicles under the terms of this act shall be reported daily to the State Controller

and at the same time deposited in the State treasury to the credit of the motor vehicle license fee fund, which fund is hereby created. The moneys in said fund are hereby appropriated as follows:

“(a) One per cent, or so much thereof as may be necessary for the use of the Department of Motor Vehicles in the enforcement of the provisions of this act.

“(b) Of the remainder of the moneys paid into said fund during the eighty-seventh and eighty-eighth fiscal years, twenty-five per cent thereof shall be paid quarterly to the cities and cities and counties of this State in the proportion that the total population of each such city or city and county bears to the total population of all cities and cities and counties in this State, as certified by the department. For the purpose of this subsection, the population of each city or city and county is that determined by the last Federal census. In the case of a city incorporated subsequent to the last census, or in the case of an unincorporated territory being annexed to a city subsequent to the last census, the department shall ascertain the population of the city or the annexed territory by multiplying the number of registered electors therein by three. The moneys so paid shall be expended by the cities and cities and counties for law enforcement and the regulation and control and fire protection of highway traffic.

“(c) Twelve and one-half per cent of said remainder of such moneys shall be paid quarterly during the eighty-seventh and eighty-eighth fiscal years to the counties and cities and counties of the State in the proportion that the population of each such county or city and county bears to the total

population of all the counties and cities and counties of the State; as certified by the department. For the purpose of this subsection, the population of each county or city and county is that determined by the last Federal census.

“(d) The balance of the moneys in said fund shall on order of the Controller be transferred to the general fund of the State. Out of such moneys so transferred there shall be set apart sufficient moneys in the amount of the principal and interest paid or necessarily to be paid during the eighty-seventh and eighty-eighth fiscal years on the bonds of the State issued under:

“(a) The ‘State Highways Act’, approved by the Governor March 22, 1909, and by a majority of the electors at the general election held November 8, 1910;

“(b) The ‘State Highways Act of 1915’, approved by the Governor May 20, 1915, and by a majority of the electors at the general election held November 7, 1916;

“(c) Section 2 of Article XVI of the Constitution as approved by a majority of the electors at a special election held July 1, 1919; and

“(d) Section 3 of Article XVI of the Constitution, as approved by a majority of the electors at the general election held November 2, 1920.

“SEC. 9. The license fee provided for by this act shall not be imposed on and after December 31, 1937; provided, however, that the terms of this act shall continue in full force and effect with respect to all license fees due thereunder and penalties on account of operations of vehicles subject thereto, to the end that the State may take

any and all steps necessary to collect the amount of such license fees and penalties.

"SEC. 9. If any section, subsection, clause, sentence or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the remaining portions of this act. The Legislature hereby declares that it would have passed the remaining portions of this act irrespective of the fact that any such section, subsection, clause, sentence or phrase of this act be declared unconstitutional."

California Vehicle Code, Statutes of 1935, Chapter  
27, Secs. 370, 376, 377, 378 and 379,  
Pages 147, 150 and 151.

"370. Registration Fees. A registration fee of three dollars shall be paid to the department for the registration of every vehicle of a type subject to registration, except for such thereof as are expressly exempted under this code from the payment of registration fees.

"376. When Registration Fees Payable. All registration fees and all fees required of a manufacturer, transporter, or dealer for any special plate or set of plates shall be paid at the time application is made to the department for such registration or such plate or plates. (Amended by Ch. 671, Stats. 1935.)

"377. Fees for Transfer of Registration. Upon application for the transfer of the title or any interest of an owner or legal owner in or to a vehicle registered hereunder, other than upon a transfer to a chattel mortgagee and other than

upon a transfer to a transferee not required hereunder to obtain the issuance to him of a new certificate of ownership and registration card, there shall be paid the following fees:

- “(1) For a transfer by the owner ----- \$1.00
- “(2) For a transfer by the legal owner. \$1.00
- “(3) For a transfer by the owner and legal owner at the same time----- \$1.00”

“378. When Fees Delinquent. Penalties.

“(a) Whenever any vehicle is operated upon any highway of this State without the registration fee having first been paid as required by this code, such fee is delinquent.

“(b) A penalty shall be added upon any application for annual renewal of registration made on or after February 5 unless the vehicle has not been operated on the highways since the expiration date.

“(c) If any other fee is not paid within thirty days after the same becomes delinquent a penalty shall be added thereto.

“(d) In every event the penalty shall be equal to the fee and shall be collected therewith. (Amended by Ch. 671, Stats. 1935.)”

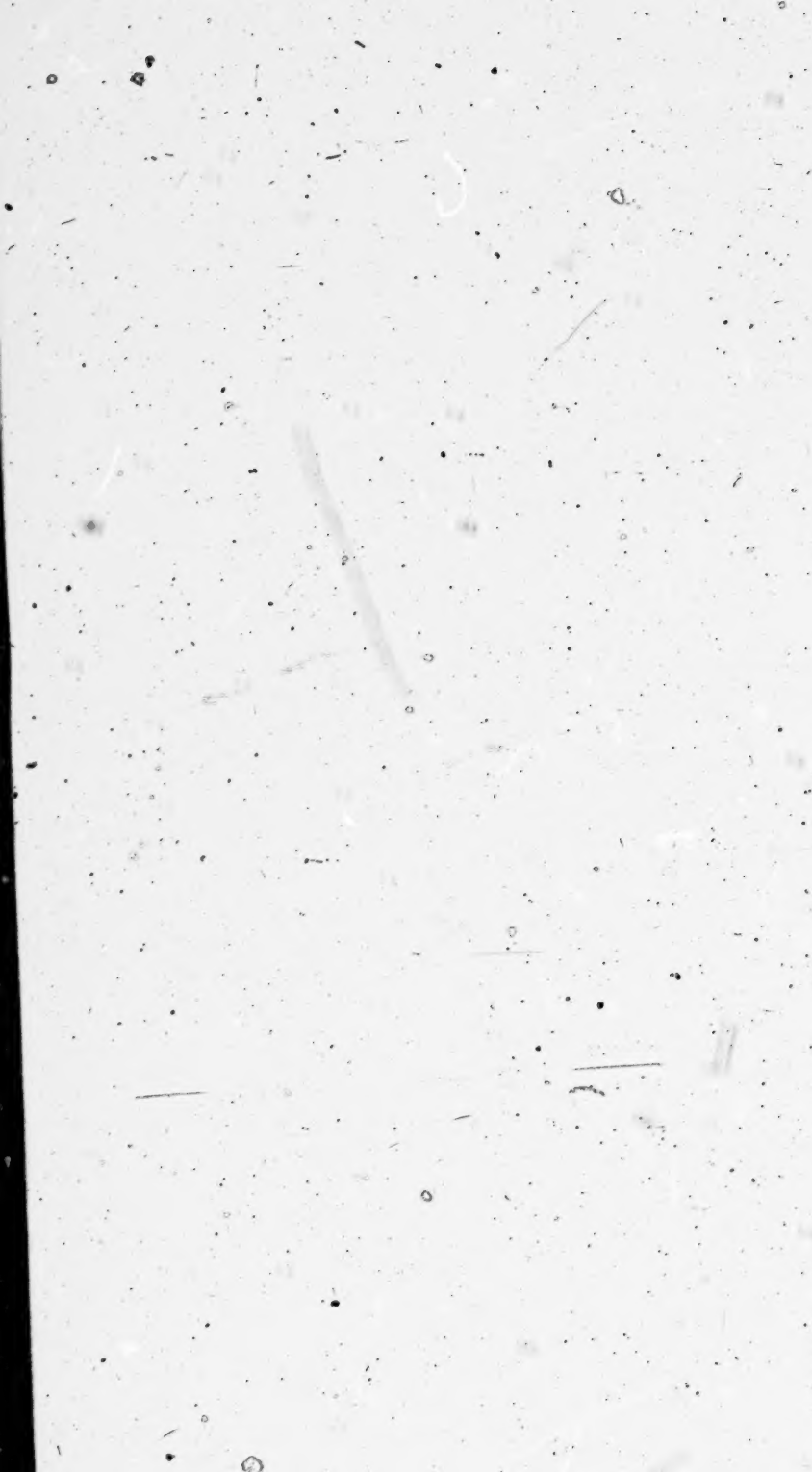
“379. Seizure and Sale of Vehicle.

“(a) Every registration or transfer fee and any penalty added thereto, from the date the same became due, constitute a lien upon the vehicle for which due.

“(b) The department shall collect such fee and any penalty by seizure of such vehicle from the person or persons in possession thereof, if any, and by the sale of such vehicle. The seizure and sale herein authorized shall be conducted and carried

out by the department in the same manner as provided by law for the seizure and sale of personal property by the assessor for the collection of taxes due on personal property."







OCT 4 1939

CHARLES ELMORE DUNN  
CLERK

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 15

E. BOTELER, Trustee of the Estate of Richmaid Creameries, Inc., a corporation, Debtor,

*Petitioner;*

vs.

RAY INGELS, Director of Motor Vehicles of the State of California; HOWARD E. DEEMS, as Registrar of Motor Vehicles of the State of California, and the MOTOR VEHICLE DEPARTMENT OF THE STATE OF CALIFORNIA,

*Respondents.*

No. 16

L. BOTELER, Trustee of RICHMAID CREAMERIES, INC., a corporation, Debtor,

*Petitioner,*

vs.

RAY INGELS, Director of Motor Vehicles of the State of California, and HOWARD E. DEEMS, as Registrar of Motor Vehicles of the State of California,

*Respondents.*

RESPONDENTS' BRIEF IN ANSWER TO PETITIONER'S  
OPENING BRIEF

EARL WARREN,

Attorney General,

H. H. LINNEY,

Deputy Attorney General,

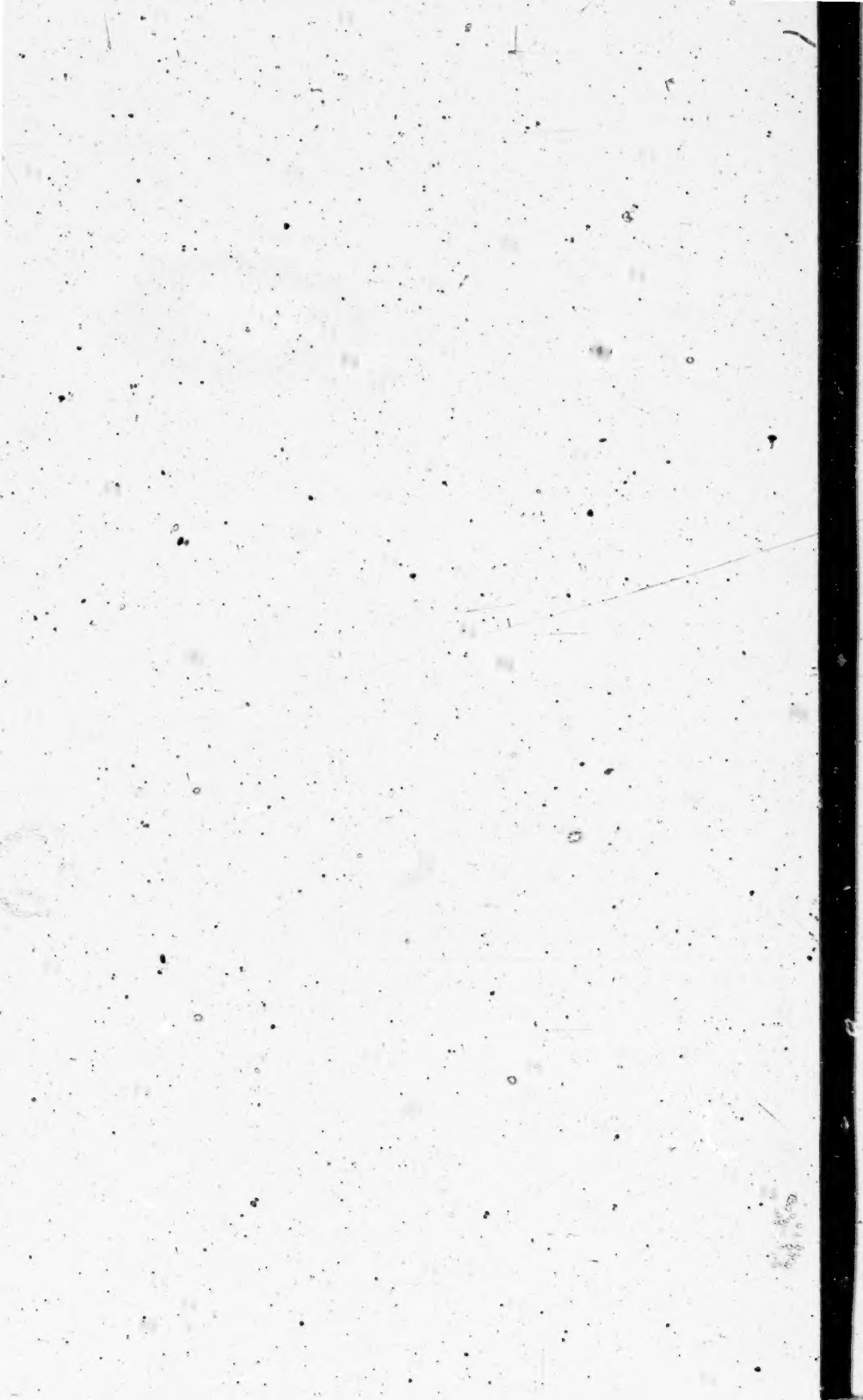
FRANK W. RICHARDS,

Deputy Attorney General,

640 State Building,

San Francisco, California,

*Attorneys for Respondents.*



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# In the Supreme Court

OF THE

## UNITED STATES

OCTOBER TERM, 1939

### No. 15

L. BOTELEK, Trustee of the Estate of Richmaid Creameries, Inc., a corporation; Debtor,

*Petitioner,*

vs.

RAY INGELS, Director of Motor Vehicles of the State of California; HOWARD E. DEEMS, as Registrar of Motor Vehicles of the State of California, and the MOTOR VEHICLE DEPARTMENT OF THE STATE OF CALIFORNIA,

*Respondents.*

### No. 16

L. BOTELEK, Trustee of RICHMAID CREAMERIES, INC., a corporation, Debtor,

*Petitioner,*

vs.

RAY INGELS, Director of Motor Vehicles of the State of California, and HOWARD E. DEEMS, as Registrar of Motor Vehicles of the State of California,

*Respondents.*

## RESPONDENTS' BRIEF IN ANSWER TO PETITIONER'S OPENING BRIEF

### STATEMENT OF THE CASE

We deem it appropriate, for a full understanding of the facts and the issues of law herein involved, to supplement Petitioner's Statement of the Case as follows:

The original petition filed by Richmaid Creameries, Inc., was filed on September 16, 1936. The applicable statute was section 77 (b) of the Bankruptcy Act (Title II, USCA, Section 207; Chapter 424, 48 Stats. 912, as amended by Chapter 577, 49 Stats. 664 and Chapter 809, 49 Stats. 965).

Later amendments to this section were made by Chapter 589, 50 Stats. 622.

The present law is to be found in Chapter 10, Title II, USCA, sections 501 to 676.

For convenience we will refer to section 77 (b) as the same appears in section 207 of the code (Title II, p. 1057).

Following the filing of the petition a temporary trustee (Chamness) was appointed as authorized in section 207 (c).

No plan of reorganization having been approved; on December 22, 1936, the court made an order directing liquidation of the assets and trustee Chamness was appointed temporary trustee, and the matter was referred to the referee in bankruptcy for further administration pursuant to the applicable provisions of section 207. The temporary trustee (Chamness) was authorized to continue operation of the business and did operate it until January 20, 1937, when petitioner (Boteler) was appointed trustee for purposes of liquidation, and thereafter petitioner continued to operate the business down to February 28, 1937.

The fees for registration and licenses on the twenty-seven motor cars and trucks used in the operation of the business due January 1, 1937, and payable without penalties up to February 4, 1937, amounted to \$410.90 but were not paid by either of the trustees. The fees not having been paid by February 4, 1937, the penalties prescribed by the California statutes became due and payable and constituted a lien on the vehicles. (Petitioner contends he did not have the funds with which to pay the taxes prior to February 4, 1937, or with which to pay the combined taxes and penalties after that date but the circuit court of appeals held otherwise.)

On February 27, 1937, the trustee applied to the Department of Motor Vehicles for the 1937 license plates on the twenty-seven vehicles and tendered the fees but not the penalties. The department refused to issue the plates except upon payment of the fees and penalties. Thereafter the trustee obtained from the referee an order requiring respondents to show cause why *the penalties should not be set aside*; why the license plates should not be issued on the *payment of the fees without penalties*; why respondents *should not be required to file claims*, or be barred from so doing, and why the trustee should not be authorized to sell the motor vehicles *free and clear of any liens* claimed by the department.

The Attorney General of California, appearing for respondents, objected to the jurisdiction of the referee to hear and determine the matters set forth in the order to show cause. The objection was overruled and evidence was taken and the matter submitted upon briefs, the Attorney General renewing his objection to the jurisdiction of the referee. Thereafter an amended petition was filed by the trustee seeking an order requiring respondents to show cause why they should not "forthwith file such claims as they assert against this estate \* \* \*" and why the trustee should not be authorized to sell said vehicles free and clear of any and all liens "upon the payment of registration and license fees without the penalties."

A hearing was had, upon the evidence previously submitted.

The evidence before the referee showed that from September 16, 1936, to January 19, 1937, inclusive, said John H. Chamness, as trustee, received \$70,006.23 in connection with his operation of the business of said debtor as aforesaid, of which receipts \$10,169.86 were obtained between January 1, 1937, when the license fees in question accrued, and January 19, 1937, inclusive (R. I. p. 79)<sup>51</sup>. Nevertheless, the operations by said trustee resulted in a deficit (R. I. p. 80)<sup>52</sup>. From January 20, 1937, when the liquidating trustee took over the property and business, to and including February 4, 1937, when said fees became delinquent, said



liquidating trustee received a total of \$7,899.61 from his operation of said business and from the cash on hand at the time he took charge of the business (R. I, p. ~~91~~<sup>59</sup>). During the same period he made disbursements in connection with the operation of said business in the total amount of \$7,624.46 (R. I, pp. ~~92-98~~). **60-64**

Despite this evidence the referee found that "the trustee herein had absolutely no funds in his possession between the date of his appointment on the 20th day of January, 1937, and the 27th day of February, 1937, with which to purchase the 1937 license plates for said motor vehicles" (R. I., p. ~~40~~, **24** par. V), and that "at no time prior to the 27th day of February, did said trustee have funds with which to pay said registration and license fees owing upon said motor vehicles and that the same condition existed from the date that the order of liquidation was made herein, to wit, the 22d day of December, 1936, to the date of the appointment of L. Boteler, the present trustee on the 20th day of January, 1937" (R. I, p. ~~41~~). **25**

Pursuant to his findings of fact and conclusions of law, the referee, on June 14, 1937, made and entered his order that any and all penalties assessed upon or claimed against the aforesaid motor vehicles operated by said trustees in connection with their conduct of the business of said debtor bankrupt should be and were thereby set aside, and ordered and directed said trustee to sell said motor vehicles

free and clear of any and all claims and liens of said Ray Ingels, Director of Motor Vehicles of the State of California, and of said Howard E. Deems, Registrar of Motor Vehicles of the State of California, and of said Motor Vehicle Department of the State of California, and further ordered, adjudged and decreed that said parties, and each of them, be and they were thereby ordered to file herein their claim or claims for the registration and license fees owing upon said motor vehicles and against the above named bankrupt estate on or before thirty days from the date of said order or be forever barred from asserting any claim or claims for taxes and/or registration or license fees against said motor vehicles and against said bankrupt estate or the trustee therein, either in his official capacity as said trustee or individually. Said referee declined, however, to make any order directing said department or said officers to receive the principal of said fees in full payment of all sums owing said department on said vehicles, and declined to enjoin said department or said officers from demanding the penalties prescribed by law as a condition to the registration or transfer of said vehicles in the State of California in 1937, but ordered, adjudged and decreed that said order be without prejudice to the right of the trustee to apply to the federal court for any injunctive relief which said trustee might deem appropriate under

the provisions of the Bankruptcy Act and subdivision 3 of General Order XII (R. I, pp. ~~43-44~~). 26-27

Petition for review of said order of the referee was duly and regularly filed (R. I, pp. ~~45-56~~), and, 27-35 on October 22, 1937, the district judge in the court below made his order denying said petition for review and confirming the findings and order of the referee (R. I, p. ~~61~~). 38-39

In the meantime said L. Boteler, trustee, had filed with said district court his petition for mandatory injunction directing said Ray Ingels as Director of Motor Vehicles of the State of California, and Howard E. Deems, as Registrar of Motor Vehicles of said state, to issue the license plates and certificates required for the operation of the vehicles of the debtor-bankrupt upon the public highways of the State of California, upon the payment of the principal of the fees required by law for such plates and certificates, and without the payment of the penalties required by law to be added thereto for delinquency (R. II, pp. ~~5-15~~). Said district court issued its order to show cause pursuant to said petition (R. II, pp. ~~15-17~~). At the time fixed in said order to show cause, said state officers named as respondents therein filed their motion to dismiss the petition for mandatory injunction upon the ground that the petition did not state sufficient facts to authorize the granting of any relief and upon the further ground that said court did not, in said bankruptcy proceeding, have summary

jurisdiction over the State of California or any of its officers to grant the relief prayed for in said petition or any relief (R. II, pp. ~~19-19~~<sup>19-16</sup>). Said motion to dismiss was denied, whereupon said respondents filed their answer to said petition for mandatory injunction, admitting certain allegations and denying others, and, as a separate and affirmative defense, again raising the question of the summary jurisdiction of said court (R. II, pp. ~~19-22~~<sup>11-13</sup>).

Evidence both oral and documentary was thereupon offered and received at said hearing upon said petition for mandatory injunction. Said evidence was the same as that set forth hereinabove, which was offered and received in the proceeding before the referee in bankruptcy herein, upon which the referee's aforesaid order of June 14, 1937, was made (R. II, p. ~~22~~<sup>44</sup>). The matter was duly submitted to said district court and said court thereafter, on or about January 3, 1938, made its findings of fact and conclusions of law, which in effect found to be true all of the allegations of said petition for mandatory injunction (R. II, pp. ~~22-26~~<sup>45-46</sup>), and particularly found that neither the temporary trustee, who operated the business of said debtor from September 16, 1936, to January 20, 1937, as hereinabove set forth, nor the permanent and liquidating trustee, who operated said business thereafter and until February 27, 1937, "had sufficient funds with which to purchase the 1937 license plates".

upon the motor vehicles used by said trustees in connection with such operation of said business (R. II, p. ~~24~~<sup>25</sup>, par. IV).

Accordingly, on said third day of January, 1938, said district court made and entered its decree, ordering and enjoining said respondent state officers to issue to said petitioner as trustee in bankruptcy, certificates of ownership and registration cards and license plates upon the motor vehicles in question upon the payment to the Motor Vehicle Department of said state of the registration fee and vehicle license fee for the year 1937 without the penalties provided by the Vehicle Code of the State of California, and the Vehicle License Fee Act of the State of California for delinquency (R. II, pp. ~~28-31~~). 18-19

From these orders appeals were taken to the Circuit Court of Appeals for the Ninth Circuit, resulting in a reversal of said orders (100 Fed. 2d 915).

The consolidated cases were then brought to this court upon writ of certiorari granted on April 24, 1939.

### SPECIFICATIONS OF ERROR

Petitioner relies upon the following specifications of error:

"1. In holding that section 57j of the Bankruptcy Act is not applicable to penalties which accrue during the course of the administration



of a bankrupt estate, while the estate is being operated incidental to its liquidation.

2. In holding that the State of California has a lien on the property of the bankrupt estate, which lien accrued during the course of administration of the bankruptcy estate.

3. In holding that the Act of June 18, 1934, (48 Stat. 993, 28 U. S. C. A., Sec. 124(a)), subjects the Trustee in Bankruptcy to liability for penalties attached to state taxes.

4. In holding that both the District Court and the Referee in Bankruptcy erred in finding that the Trustee had no funds with which to pay the motor vehicle taxes."

We are unable to find where petitioner has made any reference either in his "Summary of Argument," page 7, or in the "Argument" itself, page 8, to the second specification of error.

It appears that Paragraphs (1) and (2) of the Summary relate to the first specification of error; Paragraphs (3) and (4) of the Summary relate to the third specification of error, and Paragraph 5 of the Summary relates to the fourth specification of error.

In view of the foregoing we are somewhat in doubt as to the proper method of replying to petitioner's argument. However, notwithstanding the fact that petitioner has apparently abandoned his second specification of error, this court may be interested in the same and we have concluded that the best course to pursue is to deal with each specification of error in turn.



## RESPONDENTS' ARGUMENT

### I

#### Section 57j of the Bankruptcy Act Is Not Applicable to Claims, Not Provable in Bankruptcy, Arising Out of the Operation of a Business by a Trustee in Bankruptcy

It is respondents' position that the circuit court of appeals was correct in its decision that section 57j of the Bankruptcy Act (Section 93 of the Code) is applicable only to debts or claims provable in bankruptcy, and that it is not applicable to expenses of doing business incurred by a trustee while carrying on the business of the bankrupt in the (presumed) interest of the creditors.

In its opinion the circuit court of appeals said (100 Fed. (2d) 915, 918):

"Whether a debt or claim is provable in bankruptcy turns upon its status at the time of the filing of the petition (Sec. 760, Remington on Bankruptcy, 4th ed.); claims not owing at the time of filing of the petition are not provable. Sec. 807, *Remington; Colman Co. v. Withoft*, 9 Cir., 195 F. 250, 252; *Cantor v. Cherry*, 3 Cir., 73 F. 2d 188, Section 1 (9) of the Bankruptcy Act, 11 U. S. C. A. Sec. 1 (9), includes, in the definition of 'creditor' anyone who owns a demand or claim provable in bankruptcy. While actually neither demand nor claim, taxes are 'provable' in their nature. (Sec. 845, Remington.)

If the taxes in question were due and payable at the time of the filing of the petition, they would be provable, and it follows, under section 57j of the Act, 11 U. S. C. A. Sec. 93 (j), penalties thereon would not be allowable, save to the extent permitted by said section.

But here we are confronted with a different set of facts. These taxes became fixed by reason of the operation of the business by the trustee, after the date of the filing of the petition and after the date of what in effect amounted to an adjudication. It should be obvious that a debt or claim created thereby was not provable, not being in existence at the time of the filing of the petition and, therefore, not dischargeable.

The right of the trustee, under order of the court, to operate the business for a limited period cannot be challenged; but the estate, save as to existing lienholders not consenting—of which there are apparently none here, is liable for the charges incurred, even to the extent of the depletion of the assets of the estate, even to the detriment of labor claimants. The reason is simple: The operation of the business in such situation is for the benefit of the creditors. (Remington, Sec. 2662, 445, 446.)

The motor vehicle license or registration fee is a privilege tax levied in exercise of the police power to control and regulate travel on the public highways. It is not considered as a tax on the motor vehicle itself, but for the privilege of using the highways. (Blashfield, Cyc. of Automobile Law, Permanent Edition, Sec. 212, Vol. 1, p. 158.) A license to operate a motor vehicle is granted under the inherent right of

the state or municipality to regulate its use on the public highways or streets. (*Ibid.*, Sec. 211, p. 157.) The only automobiles required to be registered under the California Motor Vehicle Act are vehicles to be used upon the public highway (Cal. Stats. 1927, p. 1424, Sec. 11; *California Standard Finance Corp. v. Riverside Finance Co.*, 111 Cal. App. 151, 163, 295 P. 555); if the vehicles were not used, no registration fee would have fallen due under the laws of California. But, in carrying on the business of Richmaid, the motor vehicles were operated upon the public highways of the State of California and thereby the registration and license fees attached. They were not paid, but became delinquent, and on February 5, 1937, the penalties prescribed by law applied. (California Vehicle Code, Sec. 370 *et seq.*, St. 1935, p. 147 *et seq.*, California Vehicle License Fee Act, Sec. 6, as amended.)

The motor vehicles in question could not be operated in 1937 without incurring the license and registration fees. Necessarily, therefore, the fees were an expense of doing business and were chargeable against the estate. The trustee has the duty of seeking out and paying all taxes (Sec. 847, Remington). He knew, or should have known, that a license fee was required before the motor vehicles could be legally operated upon the public highways, although, if the motor vehicles had not been used the fees would not have become payable.

Were the motor vehicles operated by Richmaid itself, or any other person or corporation, there would be no question of liability for the

penalties. Is a trustee operating a business absolved from compliance with law?

The trustee cites Section 57j of the Bankruptcy Act, 11 U. S. C. A. Sec. 93 (j), as authority for holding the penalty inapplicable. That section provides that "Debts owing to \* \* \* a State \* \* \* as a penalty or forfeiture shall not be allowed, except \* \* \*" for pecuniary loss, costs and interest. We have already pointed out that the tax in question could not be a provable dischargeable claim. Obviously, the section refers to debts owing by the bankrupt and not by the trustee.

The normal course of procedure in bankruptcy is liquidation, not continuance of the business of the bankrupt. Where the business of the bankrupt is conducted for a limited period by the trustee, upon order of the court, the purpose is to benefit the creditors. The expenses of operation must be paid out of the estate. That the license and registration fees are legitimate expenses, there can be no question."

Petitioner argues, however, that since section 57j employs the term "debts," whereas in other subdivisions of that section the term "claim" or "claims" is used, the intention of congress was to give the term "debts" a broader meaning than the term "claims" and therefore the term "debts" includes indebtedness other than those that could be proved as "claims" (Brief, page 12). No authorities are cited in support of this contention and it appears to us to be completely lacking in merit. But when we advance with petitioner to his further conclu-

sion that by reason of the foregoing interpretation the term "debts" includes expenses incurred by a trustee in operating a bankrupt's business, we are more than ever convinced that petitioner's logic and reasoning are at fault and that his contention is groundless, unsupported by any authority and contrary to decided cases such as:

*Michigan vs. Michigan Trust Co.*, 286 U. S. 334.

In this case this court cited with approval

*Coy vs. Title Guarantee & Trust Co.*, 220 Fed.  
90.

In the *Coy* case personal property taxes on property in the hands of a federal receiver, with penalties and interest as provided by state law, were ordered to be paid by the receiver. The court quoted from *Cooley on Taxation*, as follows:

" 'A court,' says *Cooley on Taxation* (3d Ed.) Vol. 2, p. 834, 'having in its charge or under its control a fund or other property upon which taxes are due, will, as the representative of the sovereignty, direct them to be paid without raising any question of the means of enforcement by process, and before all other claims except judicial costs. Thus upon proper application and suitable proof a receiver will be ordered to satisfy a tax assessed against the property in his hands, and a like direction will be made in other cases where funds are held subject to the authority of the court.' "

*Bright vs. Arkansas*, 249 Fed. 950. (Franchise tax and penalties thereon held payable by receiver of railroad corporation.)



*McFarland vs. Hurley*, 286 Fed. 365. (Severance taxes with interest and penalties held collectible from federal receivers of oil company.)

*State vs. Hisey*, 84 Fed. 2d 802.

Petitioner may claim that cases of equity receiverships are not in point but the analogy is close. If receivers are liable for taxes and penalties while operating the business of insolvent concerns, there appears to be no sensible argument why a trustee operating a business should not likewise be liable.

Certainly there is nothing in petitioner's argument that suggests a sensible reason for his conclusion that section 57j applies to expenses of carrying on a business the same as to "debts" or "claims" provable in bankruptcy.

The tax claims here in question were not provable in the bankruptcy proceedings; they were never filed as such but were treated and acted upon by the referee the same as if they had been provable claims subject to the provisions of section 57j. As a matter of fact, no liability for the payment of the fees demanded by respondents arose until January 1, 1937. It was not until December 22, 1936, that the court in effect adjudicated the company a bankrupt and ordered the liquidation of its assets. At that date no fees were due the state and no provable claim therefor could be filed. The state's claim arose during the time the business was carried on



by the temporary trustee and petitioner, and was, therefore a claim not provable in bankruptcy but allowable as an expense of carrying on the business. Presumably this effort was in the interest of the creditors but the fact that the creditors may not and probably did not profit thereby can not affect the question.

The record herein discloses that the question on the appeal to the circuit court of appeals was actually a question as to the jurisdiction and power of a referee in bankruptcy to order state officials to disregard state laws and to perform acts prohibited by those laws. Strictly speaking the question was not as to the construction of section 57j of the Bankruptcy Act. The state had not filed a claim and there was no occasion to invoke the provisions of that section. It seems to us that the real question was as to the duty of the trustee under section 124 (a) of the code.

However, deeming both sections involved, the circuit court of appeals disposed of the matter by holding that section 57j was not applicable and that under section 124 (a) the trustee should have paid the fees as well as the penalties.

In so deciding we submit that the court did not err and that its decision should be affirmed.

## II

### The Circuit Court of Appeals Did Not Err in Holding that the State Had a Valid Lien for the Fees and Penalties.

It is unequivocally provided by the controlling California statutes that the license fees and registration fees demanded by the State of California constitute a lien upon the vehicles for which registration is sought. Section 379 (a) of the California Vehicle Code provides as follows:

“Every registration or transfer fee and any penalty added thereto, from the date the same became due, constitute a lien upon the vehicle for which due.”

Section 6 of the California Motor Vehicle License Fee Act of 1935, as amended by California Statutes of 1937, Chapter 6, contains an identical provision.

However, despite said provision, said referee made his conclusion of law that said Department of Motor Vehicles does not have a valid lien upon the motor vehicles in question (R. I, p. <sup>25-26</sup>42). This was apparently upon the theory that when the property passed into the custody of the court, no further lien could attach to said property. (See R. I, pp. ~~33-35~~ 19-20).

It would be just as reasonable to say that no taxes can accrue subsequent to bankruptcy, because it is the general rule that *claims* against the estate must be determined as of the date of adjudication. Manifestly, the general rule in regard to the date

as of which the rights of creditors are fixed, has no application whatsoever to taxes accruing subsequent to the adjudication of bankruptcy or to appointment of a receiver.

See

*Swarts vs. Hammer*, 194 U. S. 441, 24 S. Ct. 695, 48 L. Ed. 1060;

*Coy vs. Title Guar. & Tr. Co.*, 220 Fed. 90;

*People vs. Hopkins*, 18 Fed. 2d 731;

*Bright vs. Arkansas*, 249 Fed. 950;

*McFarland vs. Hurley*, 286 Fed. 365;

*Michigan vs. Michigan Trust Company*, 286 U. S. 334, 52 S. Ct. 512;

*Board of Commissioners vs. Bernardin*, 74 Fed. 2d 809; *Certiorari denied*, 55 S. Ct. 645; *In re Preble Corporation*, 15 Fed. Supp. 775.

Nor is there any reason why the general principle with regard to the continuance of tax liability during bankruptcy or receivership proceedings should not include the liability of the property to tax liens as provided by law.

1 *Clark on Receivers* (2d Ed.) 958;

*Southern Railway Company vs. Kentucky*, 284 U. S. 338, 52 S. Ct. 160 (1932), affirming 38 S. W. (2d) 696;

*Board of Commissioners vs. Bernardin*, *supra*;  
*Union Trust Company vs. Great Eastern Lumber Company*, 248 Fed. 46, 47;

*First National Bank vs. Ewing*, 103 Fed. 168, 178-179, 188-191; *certiorari denied* 179 U. S. 686, 21 S. Ct. 919, 45 L. Ed. 386.

And see:

*State vs. Hisey*, 84 Fed. (2d) 802.

Said referee therefore erred in making the conclusion of law that said Department of Motor Vehicles has *no valid lien* upon the motor vehicles in question. Said conclusion is contrary to the law and to the findings of fact of said referee. The state has a lien to secure the principal of the tax, at the very least.

The referee states that in any event the *penalties* can not constitute a lien because the penalties can not be allowed <sup>in</sup> bankruptcy (R. I, p. <sup>20</sup>55). No authority is cited in support of this broad proposition. The question of the *allowability* of a claim in bankruptcy, and of the *existence of a lien to secure that claim*, should not be confused. As will be hereinafter more particularly pointed out, it is well settled that there may be a *valid lien* existing in support of an obligation which is *not an allowable claim*, and that if this is the situation, the obligation, as a secured obligation, must be satisfied from the security regardless of whether or not it is a claim which could be allowed as against the general assets of the bankrupt estate. Sec. 57j of the Bankruptcy Act does not relate in any degree to the question of whether or not a lien *exists* to secure the payment of penalties.

The California statutes in question specifically provide that the penalties, as well as the principal of the fees, shall be a lien upon the vehicles for

which registration is required as a condition to their operation upon the public highways of this state (California Vehicle Code, Sec. 379; California Motor Vehicle License Tax Act, Sec. 6). Nor is there any general rule of law which would prevent the lien specified by said statute from accruing merely because the tax debtor is an officer of the court rather than an individual. The same principle under which it is held that *taxes* become liens notwithstanding the property is in the custody of the court, supports the proposition that the penalties which are added to and become a part of said taxes may likewise become liens notwithstanding the property is in the custody of the court.

*State vs. Hisey, supra*, at p. 805;

*Appeal of City of Titusville*, 108 Pa. St. 600;

*Northern Finance Corporation vs. Byrnes*, 5 Fed. (2d) 11, 12;

*Bright vs. Arkansas*, 249 Fed. 953, 955.

In any event, any possible doubt in this regard is removed by the provisions of 28 U. S. C. A. Sec. 124a. If the trustee is to be liable for taxes applicable to a business conducted by him "the same as if such business were conducted by an individual or corporation," then he must be liable for the taxes and penalties as a *secured* obligation, the same as an individual or corporation would be.

The referee erred in determining that the state had no lien for either the license fees or the pen-

alties added thereto, and the circuit court of appeals properly reversed his ruling and that of the district court.

### III

#### **Section 124 (a), 28 U. S. C. A. Subjects a Trustee in Bankruptcy to Liability for Penalties Attaching to State Taxes**

- 1. Section 57j of the Bankruptcy Act applies only as to penalties owing by the bankrupt: 28 U. S. C. A. section 124a controls as to the tax liability of the trustee**

It is submitted that section 57j of the Bankruptcy Act does not apply at all as to tax penalties owing by trustees in bankruptcy, not even to the limited extent to which said section applies, as hereinafter more fully considered, to penalties owing by the bankrupt.

Said section provides as follows:

“Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be *allowed*, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law.” (11 U. S. C. A. Sec. 93 (j).) (Emphasis added.)

In the first place, entirely aside from any question as to the effect of the act of June 18, 1934 (28 U. S. C. A. section 124a) said section 57j mani-



festly relates solely to the matter of the allow-ability of claims *against the bankrupt*. Neither said section 57j nor any other provision of the Bankruptcy Act relating to the allowability of claims against the estate has any bearing whatsoever upon the question of the liability of the *trustee* for taxes and penalties accruing by reason of his own conduct of the business of the bankrupt, or for other expenses of administration.

See

*In re Green*, 231 Fed. 253;

*Cantor vs. Cherry*, 73 Fed. (2d) 188; certiorari denied, 293 U. S. 626, 55 S. Ct. 345, 79 L. Ed. 712;

Cf. *People vs. Olvera*, 43 Cal. 492;

*Hancock vs. Whittemore*, 50 Cal. 522;

*Miller & Lux Inc. vs. Katz*, 10 Cal. App. 576.

In any event, whatever may have been the proper application of said section 57j prior to June 18, 1934, it is clear that since that date said section has no application to the liability of a trustee who chooses to conduct the business of the bankrupt. On that date congress enacted a statute which specifically related to the liability of all court officers for excise or license taxes. By that statute a new section was added to the judicial code whereby it is now provided that:

"Any \* \* \* trustee \* \* \* appointed by any United States Court who is authorized by said court to conduct any business, or who does conduct any business, shall \* \* \* be

subject to all State and local taxes applicable to such business *the same as if such business were conducted by an individual or corporation* \* \* \*” (28 U. S. C. A. section 124a.) (Emphasis added.)

This is the section, then, which now determines the tax liability of trustees in bankruptcy for taxes *accruing subsequent to their appointment, on account of their conduct of the bankrupt's business.* It is not only the *later* section, but it *specifically* deals with the *tax liability of trustees who conduct any business.* We must, therefore, determine what *that* section requires.

In the first place, it is to be observed that said section imposes on trustees the same tax liability ~~as~~ would have been borne by the bankrupt had he been operating the business. Manifestly, the tax liability imposed by said section 124a includes not merely the duty to pay the *amount* of taxes which would be owing by the bankrupt, as provided by law, but to pay said taxes at the *time* prescribed by law, and to be subject to the *penalty* imposed by law for failure so to pay said taxes. Any other construction would not in fact impose upon the trustee the same tax burden as would have been imposed on the bankrupt.

In this regard, it must also be remembered that “penalties” are but a part of the “taxes” to which they are added.

*State of California vs. Hisey*, 84 Fed. (2d) 802.

Clearly, then, in making trustees liable for "all state and local taxes" applicable to such business, congress must have intended the trustee to be liable for the *penalties* which are a *part* of said taxes, in the event of failure to pay the tax within the time prescribed by law.

Furthermore, by including in said single section (28 U. S. C. A. Sec. 124a), not only trustees, but receivers, as well, it is manifest that it was the intention of congress to impose upon trustees in bankruptcy who engage in business on behalf of the creditors of a bankrupt; the same tax liability that is imposed upon *receivers* who engage in such business. It is well settled that receivers who fail to pay taxes within the time prescribed by law are subject to the statutory penalties therefor.

*Carpenter vs. Peoples Mutual Life Insurance Company*, 94 Cal. Dec. 674;

*State of California vs. Hisey, supra*, and cases cited therein.

Similarly, then, *trustees* who operate the business of the bankrupt should likewise be required to pay the tax within the time prescribed by law or suffer the penalty imposed therefor by the tax statutes.

It is therefore submitted that section 57j of the Bankruptcy Act was not intended to apply to penalties which accrue against a trustee in bankruptcy by reason of his failure to pay, within the time prescribed by law, taxes owing by himself as trustee. And even if, prior to June 18, 1934, said section *did*

apply to the tax liability of the trustee, such is no longer true. The provisions of section 124a, alone, now control under the circumstances therein specified. Said section imposes on trustees the same tax liability to which the bankrupt would have been subject had he been conducting the business. The bankrupt would have been subject to the duty to pay the taxes *in the amount* specified by the controlling law, *at the time specified by the controlling law* or be subject to the statutory penalty for delinquency. This *same* liability is imposed on trustees who conduct the business of the bankrupt.

2. Even when section 57j is admittedly applicable, it does not relate to the question of liability for penalties or prevent their collection other than as a claim against the general assets in the bankrupt estate

Assuming for the purpose of argument that section 57j of the Bankruptcy Act does apply to penalties owing by a trustee in bankruptcy in the same manner as it applies to penalties owing by the bankrupt, and that it still so applies even as to penalties accruing against a trustee on account of failure to pay taxes owing by him on account of his conducting the business of the bankrupt, it does not follow that said section (1) prevents any penalties being assessed against such trustee, or (2) discharges the liability for any penalties which are so assessed, or (3) prevents their collection, through the bankruptcy court, as a lien upon the property

in the custody of the bankruptcy court, or (4) prevents their collection outside of the bankruptcy forum. For, even as to penalties owing by the bankrupt, to which said section 57j admittedly applies, it is well settled that the provisions of said section do not have such effect.

Said section merely provides that "debts owing to the United States, a state, a county, a district or a municipality as a penalty or forfeiture *shall not be allowed* \* \*. It does not even purport to relate to the question of the initial accrual of liability for penalties. It does not, for example, say that in certain instances no penalty shall accrue or become a liability. See *Clark vs. Barnard*, 108 U. S. 436, where this court refused an injunction to restrain the collection outside of the bankruptcy forum of a penalty owing to a state, which penalty became due after the adjudication in bankruptcy. Section 57j operates solely upon an *accrued* liability for penalties, rather than as a statutory prohibition of the accrual thereof. If, then, said section applies at all as to penalties assessed against the trustee in bankruptcy, it certainly does not apply to any greater extent than it does as to penalties owing by the bankrupt. In neither case does said section relate to the question of the *accrual of liability* for penalties by reason of failure to pay taxes within the time prescribed by law.

Nor does said section even purport to *discharge* any such liability once it has accrued.

*Carman vs. United States*, 21 Fed. Supp. 239, 240.

Therefore, there has been no discharge of the liability for the penalties herein which automatically accrued upon the failure of either of the trustees to pay the required fees within the time provided by law.

Section 57j merely provides a limitation as to the manner in which such obligation can be *enforced* and the accrued liability realized upon. Said section, if applicable, would prevent a claim for the penalties sharing in the general assets in the bankrupt estate. But this is all that said section even purports to do.

In this connection the referee stated "Just how these penalties can be paid unless paid from the 'general assets in the estate' has not been satisfactorily explained" (R. I, p. 307). It would seem to be elementary that if paid from assets upon which said obligation constitutes a lien, the payment of said obligation is not from the "general assets" in the estate. Likewise, if said obligation can for example, be collected as a condition precedent to the use of said vehicles upon the public highways of this state, it is not a satisfaction from the general assets "in the estate." And the authorities are plentiful in support of these distinctions.



It is well settled that the general provisions of the Bankruptcy Act do not control as to *liens* upon property in the custody of the bankruptcy court. Thus, the mere fact that an obligation is not an *allowable claim* under the Bankruptcy Act does not affect the validity of a statutory *lien* therefor, nor the right of the obligee to the satisfaction of the obligation *as a lien* upon the property in question.

*Security Mortgage Co. vs. Powers*, 278 U. S. 149;

*Westmoreland vs. Dodd*, 2 Fed. (2d) 212, 39 A. L. R. 1279; (certiorari denied, 267 U. S. 595);

*Britton vs. Western Iowa Co.*, 9 Fed. (2d) 488, 45 A. L. R. 711;

*Martin vs. Orgain*, 174 Fed. 772, (certiorari denied, 216 U. S. 619);

*Fudickar vs. Glenn*, 237 Fed. 808;

*Courtney vs. Fidelity Trust Co.*, 219 Fed. 57;

*English vs. Richardson*, 117 Atl. 287, 22 A. L. R. 1302.

Similarly, then, section 57j should not preclude the satisfaction of penalties as a *lien* upon property in the custody of the bankruptcy court.

*State of California vs. Moore*, 88 Fed. (2d) 564.

In that case the court held that the state was not entitled to the payment of its tax penalties as a lien upon the moneys in the hands of the trustee in bankruptcy, *because* the trustee had never had in his possession the property on which the state's

lien existed. Conversely, then, if the trustee *did* have said property in his possession and sold the same free of liens, he would be required to pay said penalties from the proceeds of sale *as a lien* thereon. As is said in the last cited case:

“(The trustee) had two remedies, one to recover the property—o. in damages to recover the value of his interest in the property. Had he recovered the property and sold it the court would decree the lien a prior claim, unless the sale had been subject to the tax \* \* \* If the trustee had sold the property giving full title, the court would on equitable principles recognize the lien on the proceeds of sale and direct payment thereof.” (88 Fed. (2d) 564, 566.)

As has been pointed out, it is unequivocally provided by the above mentioned California statutes that the penalties as well as the principal of the fees imposed as a condition to the use of the public highways of this state, constitute a lien upon the vehicles for which registration is sought (Cal. Vehicle Code, Sec. 379; Cal. Motor Vehicle License Fee Act of 1935 as amended by Chapter 6 of Statutes of 1937). It has also been pointed out that these sections apply even though bankruptcy has intervened. Therefore, even if said section 57j applies to the penalties which accrued as against the trustee, said section does *not* preclude the satisfaction of said obligation as a *lien*.

The authorities also fully support the proposition that said section 57j does not preclude the collection

of penalties, *outside the bankruptcy forum*, even if the penalties were against the *bankrupt*, and are *not secured by liens*. In other words, even where said section 57j admittedly applies it is merely intended to preclude the use of the general assets in the bankrupt estate for the satisfaction of penal obligations:

*Munz vs. Harnett*, 6 Fed. Supp. 158;

*People vs. Sheriff of Kings Co.*, 206 Fed. 566;

*In re Koronsky*, 170 Fed. 719;

*Spalding vs. State of New York*, 45 U. S. (4 Howard) 21.

These cases afford adequate examples wherein it has been held that the bankruptcy court has no power to interfere with the enforcement of state laws merely because such enforcement may *collaterally* have the effect of compelling payment on account of obligations upon which payment can not be compelled *directly in the bankruptcy proceedings*. In this regard, see also *Clark vs. Barnhard*, *supra*.

Section 140 of the California Vehicle Code provides as follows:

“It is a misdemeanor for any person to drive or move, or for an owner knowingly to permit to be driven or moved, upon any highway any vehicle of a type required to be registered hereunder *which is not registered or for which the appropriate fee has not been paid as required hereunder*, subject to such exceptions as are stated in this code.

“This section does not apply:

(a) To the moving or operating of a vehicle not previously registered from a dealer's, distributor's, or manufacturer's place of business to a place where essential parts of the vehicle are to be altered or supplied.

(b) To the transportation of a vehicle upon a highway when no part of such vehicle is in contact with the highway.

(c) To the moving of a vehicle from a place of storage to another place of storage.

(d) To the moving of a vehicle which has been disabled as the result of an accident, for the purpose of repairs.

(e) To the moving or operating of a vehicle for the purpose of dismantling or wrecking the same and permanently removing it from the highways.

No vehicle shall be operated under the provisions of paragraphs (a), (c), (d) or (e) except under a special permit issued by the department.”

It is not contended by the trustee that the vehicles here in question came within any of the exemptions to said code. Clearly, then, unless each such vehicle is registered, *and* the appropriate fee is paid therefor, as required by said code, the vehicle can not lawfully be operated upon the public highways. However, the mere fact that the California statutes thus provide remedies which may collaterally have the effect of compelling the payment of penalties imposed for delinquency in the payment of fees required by law as compensation for the use

of the public highways of this state, does not in and of itself justify either the referee or the district court in enjoining the enforcement of said laws or in setting aside said penalties. If the trustee or any other person wishes to operate said vehicles upon the public highways they can do so only if the vehicles are registered and the required fees paid. This is the unequivocal provision of the controlling state law, and neither the referee nor the district court has any jurisdiction to disregard that law.

Nevertheless, the referee made his order that the penalties assessed under said state laws "be and they are hereby *set aside*." (R. I, p. <sup>26</sup>~~43~~, emphasis added.)

Assuming, for the purpose of argument, that the referee was correct in holding that said section 57j applies at all, it does not appear how this section, or any other statutory provision or rule of law, would justify the order *setting aside* said penalties. Said section 57j does not *discharge* penalties, even when it is admittedly applicable. It does not say that no penalties shall *accrue* subsequent to bankruptcy. It does not prevent the *collection* of penalties, whether secured or unsecured, outside of the bankruptcy forum and by collateral means. It does not prevent the collection, within the bankruptcy forum, of penalties which are a *lien* upon property in the hands of the trustee. It merely provides that debts owing to a state as a penalty

shall not be *allowed*. Certainly this does not even purport to authorize the trustee to *set aside* penalties which have been added to state taxes strictly in accordance with the provisions of the state tax laws.

**3. The federal decisions construing 28 U. S. C. A., section 124a do not support the decision of the referee herein**

The referee relied upon the case of *In re Messenger's Lunch Rooms, Inc.*, 85 Fed. 2d 1002, as squarely supporting his decision (R. I, p. 31).<sup>17</sup> There are several reasons why said decision should not be followed herein.

In the first place, it is submitted that said decision is unsound. It assumes that section 57j of the Bankruptcy Act applies as to penalties on taxes accruing during the bankruptcy proceeding. As has been pointed out, this is erroneous. Said section 57j applies only to penalties which are obligations of the bankrupt; i.e., for which "claims" could otherwise be filed and "allowed" as on any other debt of the bankrupt.

Furthermore, said decision assumes that, whatever may have been the effect of section 57j of the Bankruptcy Act as to the liability of trustees for delinquency penalties prior to June 18, 1934, the same rule still applies since the enactment, on that date of section 124a of title 28 of the United States Code. This likewise is erroneous. Even if, prior to the adoption of said section 124a, said section



57j did apply as to penalties owing by trustees, it is apparent that section 57j can no longer control as to penalties which are added to taxes which accrue by reason of the trustee's own conduct of the business of the bankrupt. For, as to taxes which accrue in this manner, it is now specifically provided that the liability of the trustee shall be "the same as if such business were conducted by an individual or corporation \* \* \*." A part of this liability is to pay the taxes within the prescribed time or be subject to the prescribed penalty. Certainly, congress did not intend to provide merely that trustees who conduct any business should be subject to taxes in the same amount as if such business were conducted by an individual or corporation, but could pay said taxes at any time such trustees saw fit, without being subject to the penalty prescribed by the tax statute in order to insure prompt payment. The court in said case and the referee and district court herein have read into section 124a words which are not placed there by congress.

Again, the court in the cited case said that in any event said section 124a specifically relates only to liability for taxes, and not to liability for penalties. This discloses a lack of understanding of the relationship between taxes and penalties. Penalties added to the taxes upon delinquency are but a part of said taxes. (*State vs. Hisey, supra.*) Therefore, in providing in said section 124a, that

trustees who conduct any business shall be subject to all "*taxes* applicable to such business the same as if such business were conducted by an individual or corporation \* \* \*," congress manifestly did not intend that the trustee should *not* be liable for the statutory penalties for delinquency, which are but a *part* of the taxes to which they are added.

Finally, the court in said decision overlooked the fact that said section makes the liability of trustees the same as receivers and it is well settled that *receivers* are liable for tax penalties accruing subsequent to their appointment (*State vs. Hisey, supra*).

Therefore, even aside from any distinguishing facts in said cited case, it should not be followed herein. It is not a well considered opinion. Presumably the foregoing features were not called to the court's attention.

In any event, however, the decision in said case is not controlling herein. The facts here are materially different than the facts in said cited case. Thus, it appears that in said case the tax authorities were seeking to recover *penalties in the bankruptcy proceedings*. Furthermore, they were seeking to recover as on an *unsecured claim* against the general assets in the custody of the court. Therefore, assuming for the purpose of argument that said decision properly holds that, despite the provisions of section 124a, section 57j of the Bankruptcy Act, still controls as to penalties, owing by

a trustee who conducts the business of the bankrupt, said decision would not require the same *result* herein. For, as has been pointed out, even said section 57j does not affect the *existence* of penalties, or the *liability* therefor; nor does said section preclude the *collection* of said penalties other than from the general assets in the custody of the court. It does not appear in said *Messenger's* case that the tax constituted a *lien*, or that the tax authorities were endeavoring to collect said penalties other than from the general assets in the custody of the bankruptcy court. Manifestly, then, the facts are entirely different from those involved herein. Here the tax statutes specifically make the penalties a lien upon the vehicles in question (Vehicle Code, secs. 378, 379; Motor Vehicle License Fee Act of 1935 as amended by Stats. 1937, Ch. 6) and, in any event, the tax authorities herein are not seeking to collect said penalties from the general assets in the custody of the court. The state is content to rely upon its collateral remedy under the provision of the Motor Vehicle Code that no person can operate a motor vehicle upon the public highways unless the fees required by said code have been paid. The state is not seeking the aid of the bankruptcy court, as the tax creditor was in the *Messenger's* case. The fact that the bankruptcy forum has the power to preclude the collection of said penalties through its facilities, as a claim against the general assets in its custody, does not

mean that said forum can reach out and control the action of state officers pursuant to a valid statute, which does not in any way affect the general assets of said estate. The decision in the *Messenger's* case is therefore not controlling under the facts in the principal case.

The referee also makes special note of the fact that in said *Messenger's* case, as here, the trustee was not operating the business with the thought of making a profit, but was doing so merely as a step in the liquidation of the estate (R. I, p. 32<sup>3</sup>). It is not apparent how this feature can affect the liability of the trustee under said section 124a. That section does not justify any such distinction. For that matter, properly speaking, a trustee in bankruptcy never operates a business except for the purpose of liquidating the estate. If the estate is not in his hands for the purpose of liquidation and he is conducting the business for a profit, it should be returned to an equity receiver. Any other use of the offices of the bankruptcy forum is a misuse of the facilities provided by that court. Clearly, congress intended that the liability imposed by said section 124a should apply as against all trustees, including those who are conducting a business merely as an incident to its liquidation.

Finally, it should be noted that the decision relied upon by the referee is squarely opposed to the decision of the Circuit Court of Appeals for the Second Circuit, in *In re Humeston*,<sup>6</sup> 83 Fed.

2d 187, 189 (1936). See also *In re Preble Corporation*, 15 Fed. Supp. 775.

On authority as well as on principle, then, it is manifest that the referee erred in making his order setting aside the penalties which, under the controlling tax law, were properly added to the amount of the tax when the trustees herein failed to pay the tax within the time prescribed by law.

#### IV

**Under 28 U. S. C. A. Section 124a, Lack of Funds With Which to Pay Taxes Within the Time Prescribed by Law Does Not Prevent the Accrual of Penalties for Delinquency, and in Any Event the Evidence Herein Shows that the Trustees Had Sufficient Funds to Pay the Taxes Here in Question, and the Contrary Findings Are Not Supported by Any Evidence**

The findings of the district court on this point are Findings IV, VII and VIII (R. II, pp. 24-25.) 15-16

The tax liability imposed by section 124a upon trustees who conduct any business can not be avoided on the ground that the trustee did not have sufficient cash on hand with which to pay the required licenses at the time specified by law. Liability for taxes is not dependent upon ability to pay the amount required by law. Inability to pay is no bar to the accrual of the penalties specified by law. If, then, the trustee is to be subject to the same tax liability as the bankrupt would have been subject to if he had been operating the business,

the same liability must be imposed under the same conditions. That which would constitute no excuse for the bankrupt can not be considered as an excuse when asserted by the trustee who elects to operate the bankrupt's business. There is not the slightest suggestion in said section, or any other statute, that lack of funds would excuse the trustee from the liability which said section so clearly imposes.

The referee and district court, however, were apparently of the view that such lack of funds constituted a defense to the accrual of the penalties prescribed by the tax statutes. Thus, said referee stated, in his opinion, that:

"The rule announced in the case of the *State of California v. Hisey*, holding a receiver responsible where the penalties accrued due to his neglect, does not apply here." (R. I, p. 29.) / 6

This is manifestly an erroneous interpretation of said case. That case does not limit the liability of a receiver for penalties to instances wherein his failure to pay taxes is due to his neglect. It merely suggests that in the event his failure to pay is caused by his neglect, he may be accountable to the estate for his negligence. In other words, the circuit court of appeals stated:

"If the receiver had funds in his possession with which to pay the tax and fails to do so, thus incurring a penalty, no doubt he would be responsible to the estate in his custody for the payment of this penalty incurred because of his neglect, but this liability of the receiver would



not relieve the property in his custody from the liens imposed by law." (84 Fed. 2d 802, at 805.) (Emphasis added.)

Proceeding upon this erroneous interpretation of said case, however, said referee made a finding that neither of the trustees herein had any funds with which to pay on or before February 4, 1937, the fees in question (R. I, pp. ~~40, 41~~<sup>34-35</sup>, Pars. V and VII). Said district court, upon the separate application pending before it for a mandatory injunction, made similar findings (R. II, pp. ~~24-26~~<sup>25-26</sup>, Pars. IV, V and VIII). It is submitted that said findings are on an immaterial matter, and, even if supported by the evidence, would constitute no defense to the accrual of the penalties in question.

In any event, however, said findings are *not supported* by the evidence, and out of excess of caution the appellants in the lower court (respondents here) assigned as error the making of such findings without there being evidentiary support thereof (R. I, pp. ~~105, 113~~<sup>67-70</sup>, Par. I; R. II, pp. ~~36, 43~~<sup>22-23</sup>, Par. IV).

The evidence at the hearing before the district court was the same as the evidence at the hearing before the referee (R. II, p. ~~22~~<sup>22</sup>, Par. XII). The references herein will therefore be solely to the evidence before the referee.

The respondents do not propose to argue to this court the *weight* to be given the evidence. The respondents contend that there is absolutely *no*

evidence, except the conclusions expressed by the trustee himself, to support the findings in question. And such conclusions are squarely opposed to all of the evidence as to the *facts*.

As has been pointed out in the Statement of Facts herein, the trustee who was in charge from September 16, 1936, to January 19, 1937, inclusive, received \$70,006.23 in connection with his operation of the business, of which receipts \$10,169.86 were obtained between January 1 and January 19, 1937, inclusive (R. I, p. 79<sup>5</sup>). It is true that the operations by said trustee nevertheless resulted in a deficit (R. I, p. 80<sup>5,2</sup>). Yet this affords no answer to the fact that said trustee actually *had and disbursed* the aforesaid funds, while at the same time he was claiming that he did not have sufficient funds with which to pay the license fees owing to the State of California, which accrued on January 1, 1937. The truth is that the trustee apparently was of the opinion that certain other expenses of administration were more urgent than the taxes imposed by the laws of the State of California. However, there is no justification for paying the other operating costs, or any portion of them, and not paying the taxes which lawfully accrue as a result of the operation of the business by the trustee. The taxes in question are fees for the use of the public highways of the State of California. They are, in fact, a condition to the right to use said highways (see *Ingels vs. Riley*, 5 Cal. 2d 154). The present trus-

tee and his predecessor deemed it proper for them to exercise the privilege accorded them by the State of California, of using the public highways of said state. It was therefore their duty to pay said fees and thus comply with the laws of the state. As is said in *Gillis vs. State of California*, 293 U. S. 62, 66; 55 S. Ct. 4, 5-6:

“\* \* \* if the receiver can not continue to carry on the Company's business according to the plain direction of Congress, he must pursue some other course permitted by law.”

Similarly, the report of L. Boteler, as trustee, shows that from the time he took charge of the business on January 20, 1937, until February 4, 1937, inclusive, when the delinquency penalty accrued, he received a total of \$7,899.91 (R. I, p. 91). 59 This is at the rate of approximately \$500 per day. During the same period he made disbursements in connection with the operation of said business in the total amount of \$7,624.46 (R. I, pp. 92-98). By 60-64 permitting the taxes, which were in the amount of \$410.90, to become delinquent, penalties in the amount of \$348.20 were incurred. Nevertheless, because the trustee considered certain other obligations more pressing, he permitted said fees to become delinquent and said penalties to be added thereto. And yet the referee and the district court found that he did not have sufficient funds with which to pay said fees and that he therefore should not be required to pay the penalties prescribed by

law. Certainly if there is any instance in which a trustee should be held liable for penalties by reason of delinquency in payment of taxes which accrued by reason of his own operation of the business of the bankrupt, this is such a case. Assuming that the ability to pay is *material*, it is difficult to perceive how it can be said that the trustees herein *did not have funds* with which to pay the taxes in question within the time prescribed by law.

For the same reason that *lack of funds* constitutes no defense on the part of the trustee to the payment of the taxes to which the bankrupt would have been subject if his business had been conducted by said bankrupt, any *hardship* which may result to the trustee or the estate by reason of the enforcement of the tax laws is immaterial. Yet this is, in effect, all that the foregoing findings amount to. These findings, even if true, would not afford the trustee any grounds for being relieved from the usual force and effect of the state tax laws. Manifestly, any inability to sell said motor vehicles or inability to liquidate these particular assets of the bankrupt estate or inability to deliver clear title to said motor vehicles could have been and still can be avoided if the trustee had complied or would comply with the terms of the tax laws. Certainly, he should not by reason of his own conduct in failing to pay the fees before they became delinquent, be permitted in effect to *create* the "hardship" of which he complains. Nor should

he be permitted to refuse to pay the penalties prescribed by law on account of such delinquency and then complain of the hardship which results under the terms of the statutes. In other words, even now the trustee can avoid the "hardship" of which he complains by complying with the state laws.

In any event, however, it is apparent that said "findings" are in fact merely conclusions of law and are contrary to the law. The results of the failure to pay the fees and penalties prescribed by the California statutes here in question are that no license plates or registration certificates, and no certificates of ownership can be issued upon such vehicles, and the vehicles can not be operated upon the public highways, until said fees and penalties are paid. (California Vehicle Code, Sec. 140, *supra*.) However, there is absolutely nothing in said statutes which precludes the *sale and transfer* of vehicles without such plates and certificates. The license plates and *registration* certificates are a prerequisite to the right to *use the public highways* of the state. This does not mean that such vehicles can not be used for purposes other than operation upon said public highways. Nor is this a mere academic illustration. Innumerable vehicles are used for construction, agricultural, and like purposes, without being registered. While the certificate of *ownership* affords a certain protection to a purchaser of a motor vehicle, it is not, any more than is a title certificate in the case of real

property, a prerequisite to a transfer of the property in question. That this is true is further borne out by the fact that the district court has recognized in said finding IX (R. II, p. 26) that the trustee has in fact sold certain of the vehicles in question. Presumably the purchasers would not pay the same price for said vehicles unless they were able to obtain the certificates of ownership and license plates from the State of California which were necessary in order to use said vehicles upon the public highway. As a practical matter, the inability to obtain the license plates and certificates of ownership may affect the *value* of the vehicles in question, but as a legal matter such inability does not *preclude* the transfer of said vehicles nor their use other than upon the public highways of the state. And there is no evidence herein to show that this is not true in the present case.

If the trustee desires to sell said vehicles to persons who wish to use them upon the public highways and who wish the license plates and certificates of ownership, there is no reason why the trustee should not comply with the law the same as any other owner of motor vehicles. The mere fact that compliance with the laws of the state would leave the trustee with less funds for expenses of administration and claims of creditors entitled to share in the general assets in the bankrupt estate, does not support his contention that enforce-



ment of the state laws interferes with the due and orderly liquidation of the bankrupt estate. If it is important that estates in bankruptcy be promptly and efficiently administered, it is equally important that taxes be promptly paid. As this court has had occasion to state—

“Taxes are the lifeblood of government, and their prompt and certain availability an imperious need.” (*Bull v. United States*, 295 U. S. 247, at 259, 55 Sup. Ct. 695, at 699, 79 L. Ed. 1421 (1935).)

While it is not apparent exactly why the findings here in question were deemed material in any event, the respondents herein, out of an excess of caution, felt it advisable, on account of the error in the legal and factual basis for said findings, to assign the making thereof as error on their appeal to the circuit court of appeals. These findings can not be the grounds for affording the trustee the relief prayed for and granted herein, to which relief he was not in any event entitled.

The decree of the circuit court of appeals, reversing the orders of the referee and the orders of the district court was, we submit, correct in respect to all matters herein complained of by petitioner.

## V.

### Conclusion

Briefly reviewing the facts and the contentions of the parties herein we respectfully submit:

The trustees conducted the business of the bankrupt and in connection therewith they operated upon the public highways of the State of California the motor vehicles here in question. They thereby became liable for the usual registration and license fees imposed for the privilege of so using said highways. Said fees were not paid by either of said trustees. When they were not paid by February 4, 1937, the penalties prescribed by law were added thereto. There is no provision of law which exempts trustees from the accrual of such penalties. Section 57j of the Bankruptcy Act does not have such effect. It applies solely to penalties accruing as against the bankrupt rather than against the trustee. Section 124a of Title 28 of the United States Code controls as to the tax liability of a trustee who conducts any business. Under said section the trustee is subject to the same tax liability as would have been imposed upon the bankrupt had the latter conducted the business. Upon failure to pay the taxes within the prescribed time, then, the penalties necessarily accrued in the same manner as they would have accrued against the bankrupt.

In any event, even if section 57j of the Bankruptcy Act were applicable, it does not prevent the accrual of penalties nor operate to discharge any such liability once it has accrued. Nor does it bar the collection of penalties except in the particular manner specified in said section, viz, as a claim


against the general assets in the bankruptcy estate. It does not preclude the satisfaction of penalties as a lien upon property in the custody of the court. The penalties here in question are such a lien. This lien must be recognized even under the provisions of the Bankruptcy Act. Furthermore, section 57j does not affect any collateral remedies which may have the effect of compelling payment of the penalties. The statutes here in question preclude the operation of the vehicles upon the public highways unless the fees are paid. Section 57j provides no authority for setting aside this effect of the state tax laws.

In any event, the district court erred in granting relief from said penalties in a summary proceeding. The action is purely a mandamus action against state officers over which the district court probably would not have jurisdiction even in a plenary action, let alone by way of summary proceedings.

The liability of a trustee for taxes arising by reason of his conduct of the business of the bankrupt is not dependent upon his ability to pay the same. In any event, the evidence herein discloses that the trustees did in fact have sufficient funds with which to pay the fees within the time prescribed by law if they had deemed it expedient to do so.

Similarly, the liability of a trustee for such taxes is not dependent upon the question of whether

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the enforcement of the tax liability would cause hardship upon said trustees or the bankrupt estate. In any event, the evidence and the law herein clearly shows that such hardship would not result in this case and that if there is any such hardship it is caused by the trustees' own actions.

We believe the decision by the circuit court of appeals was in all respects correct and therefore ask that it be affirmed.

Respectfully submitted.

EARL WARREN,  
Attorney General,

By H. H. LINNEY,  
Deputy Attorney General,

FRANK W. RICHARDS,  
Deputy Attorney General,  
*Attorneys for Respondents.*







IN THE  
**SUPREME COURT**  
OF THE  
**UNITED STATES.**

OCTOBER TERM, 1939.

Nos. 15 and 16

L. BOTELEK, Trustee of the Estate of RICHMAID CREAMERIES, INC.,  
a corporation, Debtor,

*Petitioner,*

*vs.*

RAY INGELS, Director of Motor Vehicles of the State of California,  
HOWARD E. DEEMS, as Registrar of Motor Vehicles of the State  
of California, and the MOTOR VEHICLE DEPARTMENT OF THE  
STATE OF CALIFORNIA,

*Respondents.*

L. BOTELEK, Trustee of the Estate of RICHMAID CREAMERIES, INC.,  
a corporation, Debtor,

*Petitioner,*

*vs.*

RAY INGELS, Director of Motor Vehicles of the State of California,  
and HOWARD E. DEEMS, as Registrar of Motor Vehicles of the  
State of California,

*Respondents.*

**PETITION FOR REHEARING.**

RAPHAEL DECHTER,

633 Subway Terminal Bldg., Los Angeles,

*Counsel for Petitioner.*

*Of Counsel:*

THOMAS S. TOBIN,

JOSEPH J. RIFKIND,

DAVID SCHWARTZ.

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IN THE  
**SUPREME COURT**  
OF THE  
**UNITED STATES.**

OCTOBER TERM, 1939.

Nos. 15 and 16

L. BOTELER, Trustee of the Estate of RICHMAID CREAMERIES, INC.,  
a corporation, Debtor,

*Petitioner,*

*vs.*

RAY INGELS, Director of Motor Vehicles of the State of California,  
HOWARD E. DEEMS, as Registrar of Motor Vehicles of the State  
of California, and the MOTOR VEHICLE DEPARTMENT OF THE  
STATE OF CALIFORNIA, "

*Respondents.*

L. BOTELER, Trustee of the Estate of RICHMAID CREAMERIES, INC.,  
a corporation, Debtor,

*Petitioner,*

*vs.*

RAY INGELS, Director of Motor Vehicles of the State of California,  
and HOWARD E. DEEMS, as Registrar of Motor Vehicles of the  
State of California;

*Respondents.*

**PETITION FOR REHEARING.**

*To the Honorable Justices of the Supreme Court of the  
United States:*

Comes now L. Boteler, Trustee of the Estate of Rich-  
maid Creameries, Inc., Bankrupt, and petitioner herein,  
and presents this his petition for a rehearing of the deci-  
sion of the above Honorable Court rendered November 6,

1939, in the above-entitled matter, and in support thereof, respectfully shows:

I.

That said memorandum of decision of the above court should be modified by striking the word "only" from page 3, line 7, after the words "First. Subdivision 57(j)" so that the same shall read: "First. Subdivision 57(j) prohibits". As said decision reads at the present time it might be construed as limiting the effect of 57(j) to tax penalties only, and not to penalties in general. Section 57(j) applies to penalties and forfeitures of every kind and character. See *United States v. Birmingham Trust Co.*, 258 Fed. 562.

II.

The decision of the above court fails to give any application or distinction to the fact that the word "debts" is used in Section 57(j), whereas throughout Section 57 the word "claims" is used. Debt is defined by Webster's New International Dictionary, Second Edition, Unabridged, as follows:

"1. That which is due from one person to another, whether money, goods or services; that which one person is bound to pay to another, or to perform for his benefit; a thing owed; an obligation or liability."

The Bankruptcy Act indicates that the word "debt" is of broader scope and comprehension than the word "claim". See Section 1, subdivision 11, and subdivision 14 of the Bankruptcy Act.



III.

The decision of the above court fails to give effect and distinction to the fact that under the Bankruptcy Act, as it existed at the time of the filing of the petition in bankruptcy in the above matter, to-wit, September, 1936, taxes were not required to be filed as claims under the Bankruptcy Act, but were required to be paid by the Trustee under Section 64 of the Bankruptcy Act whether claims were filed or not. See *In re William F. Fisher & Company*, 148 Fed. 907; *In re Ashland Emery & Corundum Co.*, 229 Fed. 829; *Stwarts v. Hamner*, 194 U. S. 441; U. S. Codes 64, Title 11, page 7, Sec. 104; *In re Standard Composition* 23 Fed. Supp. 391 at 395.

IV.

The court erred in its decision in stating:

“and Section 57(a) makes clear that Section 57 as a whole relates only to claims justly owing from the Bankrupt to the creditor”

for the reason that Section 64, subdivision 4, of the same Bankruptcy Act likewise provides:

“taxes legally due and owing by the Bankrupt to the United States or any state or subdivision thereof”

and prior to the present Bankruptcy Act of 1938, Section 64(a) provided

“the court shall order the Trustee to pay all taxes legally due and owing by the Bankrupt to the United States, state, etc.”

and under the decisions it has been uniformly held that while Section 64 does not in express words refer to taxes assessed or becoming due after the institution of the bank-

ruptcy proceedings, that Section 64 nevertheless applies to taxes both before and after the filing of the petition, and therefore it should be considered in the light of the ordinary rule of statutory interpretation that when Congress readopted Section 64 they did so in the light of the decisions theretofore construing the same.

See:

*Missouri v. Ross*, 299 U. S. 72, 81 L. Ed. 46;

*In re William F. Fisher & Company*, *supra*;

*In re Ashland Emery & Corundum Co.*, *supra*;

*Remington on Bankruptcy*, Vol. 6, Sec. 2808, p. 405.

*In re Denver & R. G. W. R. Co.*, 27 Fed. Supp.

It has been held that while Section 64 requires a Trustee to pay taxes accruing both before and after the filing of a bankruptcy petition, there is no requirement on the part of a Trustee to pay penalties. Therefore, in the case of taxes accruing after the bankruptcy proceedings have been commenced, the Trustee has been required to pay only taxes plus interest at the usual legal rate prevalent in the state.

*Swarts v. Hammer*, 194 U. S. 441, 48 L. Ed. 1060, 24 Sup. Ct. 695;

*Stanard v. Dayton*, 241 U. S. 588, 60 L. Ed. 1190, 36 Sup. Ct. 395.

See also *In re Ashland Emery & Corundum Co.*, 229 Fed. 829, wherein the court said:

"Section 64a contains no provision for the payment of penalties; and I do not think it can fairly be construed to include them especially when, as here, the estate was in the course of administration during the entire period when they accrued."

V.

The decision of the above court should be clarified so as to specifically not confuse the courts in matters hereafter coming before them by stating that in arriving at the decision in this case no rule or decision is being made as to the respective rights of a Trustee in Bankruptcy and of a taxing body, where a bankruptcy estate is being administered in the ordinary course of liquidation and where a Trustee is not operating a business. Or, this court should, once and for all, settle the question by announcing what this court has heretofore announced, that debts only for just and adequate claims should be allowed and that therefore penalties for taxes or for any other debt accruing against the bankrupt estate in the ordinary course of liquidation and not where a Trustee is operating a business, should not be allowed. Penalties, as this court in its decision said, and as it has heretofore stated, are imposed as a means of coercion to compel payment. If the reason for such rule does not exist, the rule itself should cease. The same reason for disallowing penalties against the bankrupt estate or taxes accruing before bankruptcy, applies just as forcibly after bankruptcy for the reason that until liquidation is completed the Trustee, like the Bankrupt, is without funds to meet obligations as they mature:

See:

*Kuehner v. Irving Trust Co.*, 229 U. S. 445;

*Kothe v. Taylor Trust*, 280 U. S. 224;

*New Jersey v. Pressed Steel Car Co.*, 100 Fed. (2d) 147;

*In re Ashland Emery & Corundum Co.*, 229 Fed. 829, at 831;.

*In re Reimer & R. G. W. R. Co.*, 27 Fed. Supp. 983.

*In re Standard Composition Co.*, 23 Fed. Supp.  
391, at 395;

*Gilbert's Collier on Bankruptcy*, 4th Ed., Sec. 1064,  
p. 783;

*In re Messenger's Merchants Lunch Rooms, Inc.*,  
85 Fed. (2d) 1002.

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted and that the judgment of this Honorable Court be, upon further consideration, reversed or modified in accordance with the within petition.

Respectfully submitted,

RAPHAEL DECHTER,  
*Counsel for Petitioner.*

*Of Counsel:*

THOMAS S. TOBIN,  
JOSEPH J. RIFKIND,  
DAVID SCHWARTZ.

**Certificate of Counsel.**

I, ....., one of the counsel for the above-named petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

.....  
*Counsel for the Petitioner.*

# SUPREME COURT OF THE UNITED STATES.

Nos. 15, 16.—OCTOBER TERM, 1939.

L. Boteler, Trustee of the Estate of  
Richmaid Creameries, Inc., a cor-  
poration, Debtor, Petitioner,

15 vs.

Ray Ingels, Director of Motor Vehicles  
of the State of California; Howard  
E. Deems, as Registrar of Motor Ve-  
hicles of the State of California, and  
the Motor Vehicle Department of the  
State of California.

L. Boteler, Trustee of Richmaid Cream-  
eries, Inc., a corporation, Debtor,  
Petitioner,

16 vs.

Ray Ingels, Director of Motor Vehicles  
of the State of California, and How-  
ard E. Deems as Registrar of Motor  
Vehicles of the State of California.

On Writs of Certiorari to  
the United States Circuit  
Court of Appeals for the  
Ninth Circuit.

[November 6, 1939.]

Mr. Justice BLACK delivered the opinion of the Court.

Under California law vehicle license and registration fees are due the State on January first of each year; they become delinquent when a vehicle is operated without registration and license; if the fees are not paid within thirty days after delinquency a penalty equal to the fees accrues; fees and penalties are protected by statutory lien on the vehicle from the due date.<sup>1</sup>

The single question presented is sufficiently stated by the petition for certiorari:

"Is a bankrupt's estate liable to penalties imposed by State statutes for non-payment of automobile license fees where license fees

<sup>1</sup> c. 362, Calif. Stat. of 1935, p. 1313, as amended. c. 27, Calif. Stat. of 1935, Calif. Vehicle Code, pp. 147, 150, 151.

and penalties claims accrued during operations for purposes of liquidation of the business of bankrupt's estate by the Trustee in Bankruptcy<sup>1</sup>

As trustees of a business in bankruptcy, petitioner and his predecessor continuously operated unregistered and unlicensed vehicles on California highways, from January first to February twenty-seventh. Tender of fees without accrued penalties was rejected by California. Upon petition of the trustee, the referee in bankruptcy ordered the vehicles sold free and clear of any claims or liens of the State but permitted California to file claims for fees, without penalties, within thirty days or be forever barred. The referee's order was confirmed by the District Court which also directed California officials (respondents here) to issue licenses to the trustee. The Circuit Court of Appeals reversed, ordering alternatively that accrued fees and penalties be paid, or that the vehicles be disposed of subject to the lien of the State for the unpaid taxes and penalties.<sup>2</sup> Because of asserted conflict with the Court of Appeals for the Seventh Circuit,<sup>3</sup> we granted certiorari.

The trustee insists that the State is barred from collecting the penalties because of subdivision 57(j) of the Bankruptcy Act<sup>4</sup> which provides:

"Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law."<sup>5</sup>

Recognizing that 57(j) prohibits allowance of tax penalties accruing prior to bankruptcy<sup>6</sup>, the State nevertheless insists that this subdivision does not exempt the trustee from State laws applicable to the business he operates after bankruptcy. California considers the trustee subject to the requirements and penalties of its license and registration laws under an Act of Congress of June 18, 1934, 48 Stat. 993, reading in part as follows:

<sup>2</sup> 100 Fed. (2d) 915. The court below stated that the two cases here reviewed (Nos. 15, 16) "involved the identical facts, were consolidated for briefing and hearing and are disposed of in this opinion." We have followed the same course.

<sup>3</sup> In re Messenger's Merchants Lunch Room, 85 Fed. (2d) 1002.

<sup>4</sup> e. g. 11 U. S. C., § 93(j).

<sup>5</sup> Cf. People v. Jersawit, 263 U. S. 493, 496.



"Any receiver, liquidator, referee, trustee, or other officers or agents appointed by any United States court who is authorized by said court to conduct any business, or who does conduct any business, shall, from and after June 18, 1934, be subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation; . . . ."

*First.* Subdivision 57(j) only prohibits allowance of a tax penalty against the bankrupt estate if incurred by the bankrupt before bankruptcy by reason of his own delinquency. After bankruptcy, it does not purport to exempt the trustee from the operation of State laws, or to relieve the estate from liability for the trustee's delinquencies.<sup>6</sup> For 57(j) is a subdivision of Section 57 of the Bankruptcy Act governing "Proof and Allowance of Claims." And 57(a) makes clear that Section 57 as a whole relates only to claims "justly owing from the bankrupt to the creditor." The fees and penalties in issue were incurred by the trustee in operating the bankrupt business, and thus were not owed by the bankrupt to the State as a "creditor." Therefore, regardless of other rights the State might have, it could not file proof of claim for these fees and penalties as a creditor under Section 57. And neither the tax liability nor the penalties incurred by the trustee after bankruptcy are governed by this Section or its subdivisions. We must look elsewhere than to 57(j) to determine whether the court below correctly held that California may enforce its statutory penalties against this estate.

*Second.* The Act of June 18, 1934 declares that a trustee in bankruptcy conducting a business, as this trustee was, "shall . . . be subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation. . . ." As originally offered, this Act applied only to receivers.<sup>7</sup> Reported by the House Committee on the Judiciary without amendment,<sup>8</sup> the bill was amended on the House floor to apply not only to receivers but to a "liquidator, referee, trustee or other officer or agent."<sup>9</sup>

We need not determine whether, without legislation such as the 1934 Act, the fact that a local business in bankruptcy is operated

<sup>6</sup> Whether the trustee might be personally surcharged because his refusal to pay the fees subjected the estate to the increased liability of the penalties, is not presented.

<sup>7</sup> Cong. Record, 73rd Cong., 2nd Sess., p. 4037.

<sup>8</sup> *Id.*, p. 6067.

<sup>9</sup> *Id.*, p. 6656.

by a bankruptcy trustee makes the business immune from State laws and valid measures for their enforcement. Clearly, means of permitting such immunity from local laws will not be read into the Bankruptcy Act. At any rate, Congress has here with vigor and clarity declared that a trustee and other court appointees who operate businesses must do so subject to State taxes "the same as if such business[es] were conducted by an individual or corporation." If businesses in California not conducted by a bankruptcy trustee are delinquent in the fees, they must pay the penalty. However, petitioner's contention would exempt a trustee operating a business in bankruptcy from this double tax liability which other delinquents must bear. A State would thus be accorded the theoretical privilege of taxing businesses operated by trustees in bankruptcy on an equal footing with all other businesses, but would be denied the traditional and almost universal method of enforcing prompt payment.

Taxation on and regulation of highway traffic are matters of constantly increasing importance and concern to the States. The Act of 1934 indicates a Congressional purpose to facilitate—not to obstruct—enforcement of State laws; the court below correctly recognized and applied this Congressional purpose and its judgment is

*Affirmed.*

Mr. Justice BUTLER took no part in the consideration or decision of this case.

A true copy.

Test:

♡

*Clerk, Supreme Court, U. S.*



**MICRO CARD**

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